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ABSTRACT

In relation to law enforcement and the courts, the press serves to inform the public about crimes and how government institutions deal with them. The press also plays a crucial role in assuring that the rights of individuals guaranteed by the Sixth Amendment are protected. The issue of prejudice, caused by news coverage of crime and criminal proceedings, has been raised in many appeals by convicted persons. The appellate court has refused in virtually all cases to overturn convictions on grounds of pretrial or trial news coverage. Through an analysis of historical and legal precedent, the summary and five chapters of this book describe the way in which the appellate courts have interpreted these cases. Chapter 1 presents the history of the free press of the United States. Chapter 2 discusses the Supreme Court's interpretation of the First Amendment and the evolution of the rights of the free press. The free press and a free trial as guaranteed in the Constitution's Sixth Amendment are outlined in chapter 3. Chapter 4 examines the closing of courtrooms in an effort to ensure the right to an impartial jury, while television in the courtroom is the subject of chapter 5. (SM)

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Free Press & Fair Trial

American Society of Newspaper Editors
American Newspaper Publishers Association Foundation

Table of Contents

Chapter I 1
Chapter II 11
Chapter III 17
Chapter IV 53
Chapter V 68
Footnotes 75

Foreword

The founding fathers of the United States of America believed a free press is fundamental to a democratic government. The purpose is to create a forum for public discussion on matters of concern to a self-governing people.

Public discussion and debate properly reach all aspects of government—including law enforcement and the courts, where the press acts as handmaiden to the public, informing the people about crimes and how government institutions deal with crime. The press also plays a critical role in assuring that Sixth Amendment rights of individuals are protected.

Crimes and criminal proceedings are of legitimate interest to the public. Court rules or rulings that discourage or suppress public discussion and debate can foster gossip, rumor and misinformation. It is, of course, true that because the press is free to publish facts and comments about crimes and criminal proceedings, there may be occasions when what is published will be false or misleading or perhaps even prejudicial. The publication of erroneous material is liable to punishment, and remedies exist to mitigate the damage that may result. But rumor and gossip, and the ignorance and prejudice they promote, are not subject to any control, nor are they liable to punishment.

In 1967 the American Newspaper Publishers Association issued a report titled "Free Press and Fair Trial," prepared by ANPA General Counsel Arthur B. Hanson. He was aided by a special committee of 12 publishers and editors that spent two years studying the relationship between the rights of a free press under the First Amendment and an accused person's right to a public trial by an impartial jury under the Sixth Amendment.

"Free Press and Fair Trial" was offered by ANPA as "a contribution from daily newspapers to the public discussion of this important subject." The report included historical material, case analyses and other resource documents pertinent to the subject.

In 1980 ANPA and the American Society of Newspaper Editors decided to issue an updated edition of "Free Press and Fair Trial." Now, in 1987, we are publishing a third edition, revised to reflect Supreme Court decisions since 1980.

This guide is designed to make journalists, judges and lawyers more aware of the purposes of the First and Sixth Amendments, and more sensitive to the rights of a free press, the rights of privacy and the rights of the accused.

☆☆☆☆

This latest revision is the product of three people whose professional lives bridge the law and the press. They are Dale Spencer, professor of journalism at the University of Missouri; Richard M. Schmidt Jr., a member of the Washington law firm of Cohn & Marks and legal counsel for the American Society of Newspaper Editors, and David Stolberg, assistant general editorial manager of Scripps Howard Newspapers. ANPA and ASNE acknowledge their contributions with deep appreciation.

We are also indebted to three talented cartoonists for their willingness to brighten the text with their witty commentaries—Jim Berry of the Newspaper Enterprise Association, Jim Borgman of the Cincinnati Enquirer and Paul Conrad of the Los Angeles Times.

The Scripps Howard Foundation has funded a major portion of costs involved in publishing both the 1980 and 1987 revisions. Thanks to the Foundation's generosity, income from sales of the book is shared by ANPA Foundation and ASNE for their First Amendment activities.

Finally, we are grateful to the staffs of our two organizations whose unfailing spirit of cooperation helped make the idea a reality.

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Introduction

The issue of prejudice caused by news coverage of crime and criminal proceedings has been raised in many appeals by convicted persons, has given rise to many gag orders, and has been viewed by the courts as more than a theoretical problem. Courts have repeatedly stated that the rights of the press and criminal defendants do conflict unless an accommodation can be reached.

Although the appellate courts have refused in virtually all these cases to overturn convictions on grounds of pretrial or trial news coverage, their refusal generally has been based on the fact that other means existed to avoid the conflict or mitigate its effects. Nevertheless, the courts have recognized that the proper solution to the conflict requires them to defer to the preferred status of First Amendment rights. This summary and the chapters that follow describe, through an analysis of historical and legal precedent, how this conclusion has been reached.

Effect of Judicial Restraints on the Press

Freedom of the press requires the right to gather, print and circulate information. Any judicial restraint on those rights constitutes a prior governmental restraint on publication. It is censorship when judges prohibit law enforcement officers from providing facts on which the public can make judgments and act intelligently.

In reporting crime news, the press cannot submit to any restriction that would deprive the accused of the right to full and unfettered dissemination of the facts. As the eyes and ears of the public, the newspaper is a watchdog. In the free functioning of its responsibility, it is the role of the press to see that a defendant is properly treated and fairly tried and to see that prosecutors and judges fulfill their duty to the public.

A speedy and public trial by an impartial jury as guaranteed by the Sixth Amendment can be assured only as long as there is a free press. On numerous occasions, the press has ferreted out evidence proving a

defendant's innocence. Often, too, the public interest has been protected by newspaper disclosure of improper methods used by police in arrest and investigation. These safeguards cannot be assured if the freedom of the press established by the Constitution is replaced by censorship or restrictions on full reporting.

Effect of Pretrial News Coverage

In 1966, Justice Tom Clark, writing for the majority of the Supreme Court in *Sheppard v. Maxwell*, stated: "From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent." However, in 1976, in *Nebraska Press Association v. Stuart*, Chief Justice Warren Burger concluded that the cases alleging prejudicial publicity that the court had previously decided "taken together . . . demonstrate that pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial."

Although Chief Justice Burger did not cite any empirical evidence, studies in this area generally support the Chief Justice's conclusion. In an article in the Stanford Law Review published in 1977, Rita J. Simon reviewed the research that had analyzed the influence of news coverage on juries and concluded:

> The Supreme Court's opinion in *Nebraska Press Association v. Stuart* made no mention of the empirical studies discussed above. Nevertheless, the opinion was consistent with the bulk of the findings of those studies in coming down strongly on the side of a free press. Experiments to date indicate that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence. The results show that when ordinary citizens become jurors, they assume a special role in which they apply different standards of proof, more vigorous reasoning and great detachment.*

Even if we accept that in rare cases, pretrial reporting may help create an overriding prejudice in potential jurors, the Supreme Court has repeatedly pointed out that there are ways to provide effective safeguards. These include change of venue, change of venire, continuance, severance, *voir dire*, blue ribbon juries, isolation of the jury, instructions, retrial, appeal and *habeas corpus*. The court's decisions and practical experience indicate that these remedies are adequate to protect the rights of a defendant.

Judicial Response to Press Coverage of Crime News

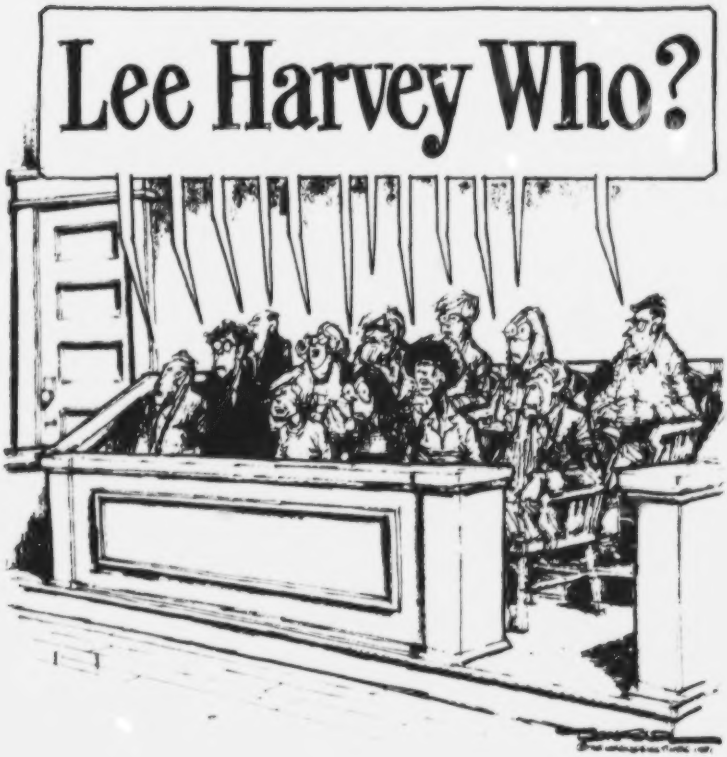
The Supreme Court has struck down in recent years most of the restraints that trial courts have attempted to impose on press coverage of criminal proceedings.

Gag orders against the press have been virtually prohibited under the First Amendment, and the court has affirmed the right of the press to publish information obtained from public records and public proceedings. The court has ruled that the press and public have a right to attend criminal trials and, in so ruling, has recognized for the first time a First Amendment right of access to news.

Press Response

In this age of plea-bargaining and expedited court proceedings, pretrial hearings often are the only court proceedings in which criminal charges are adjudicated. The press cannot accept restrictions that, by routinely closing these pretrial hearings, make a mockery of the public's First Amendment right to attend criminal trials. The press must be vigilant in protecting its right to a hearing whenever a court closing is proposed.

At the same time, newspapers should not abuse their right to publish without prior restraint. Nor should they shirk their responsibilities. In the pursuit of truth, it is well to recall the words of English editor C. P. Scott. Pointing out that the primary duty of a newspaper is gathering news, he said: "At the peril of its soul it must see that the supply is not tainted. Neither in what it gives, nor in what it does not give, nor in the mode of presentation, must the unclouded face of truth suffer wrong. Comment is free but facts are sacred."


Lee Harvey Who?

Chapter I

America's Free Press, a History

> The framers (of the Bill of Rights) . . . did not invent the conception of freedom of speech as a result of their own experience of the last few years. The idea had been gradually molded in men's minds by centuries of conflict. . . . It was formed out of past resentment against royal control of the press under the Tudors, against Star Chamber and the pillory, against the parliamentary censorship which Milton condemned in his Areopagitica, by recollections of heavy newspaper taxation, by hatred of the suppression of thought which went on vigorously on the continent during the eighteenth century. . . .[1]

Control of the written word dates back at least as far as the public burning of undesirable books by the Emperor Augustus.[2] Punishment for writing material deemed undesirable is as old as the Edicts of Constantine, which made certain writing punishable by death. Control of writing was effected by the Church after the recognition of the Bishop of Rome as its head. In A.D. 490, a catalogue of forbidden books was issued. Governmental and ecclesiastical censorship also was prevalent in the middle ages.

Pre-Colonial Period Through 1869 in England

When Henry VIII severed the Church of England from the control of the Pope, he recognized the political importance of controlling the press. Punishment for denying the royal power of control of the press was beheading. Control was enforced by letters patent granting the privilege to print and sell books. The exclusive privilege of keeping presses was granted to the Stationer's Company by royal charter in 1557. Regulation of

the company was vested in the infamous Court of Star Chamber, which had been granted the power of general censorship.[3]

In the reign of Elizabeth I, the privilege of printing was extended to a select few to publish such books as "should first be seen and allowed." Printing was forbidden except in Oxford, Cambridge and London.[4] According to one writer, the "illiteracy of the general public and its long submission to authority was such that public opposition to the regulation of printing did not at that time manifest itself."[5]

Nevertheless, a yearning for freer expression resulted at times in the publication of seditious libel against the queen's government. These publications were punished as a capital offense, for which truth was no defense.[6] Ordinances for the regulation of the press were published by the Star Chamber in 1586 because of "the enormities and abuses of disorderly persons professing the art of printing and selling books."[7] These ordinances authorized the Stationer's Company to search houses and offices for unlawful publications and to destroy all such publications and all presses found.

Under the Stuart regime, the continuing increase in illegal press activity caused the Star Chamber to issue regulations requiring licensing and registration before publication, under penalty of forfeiture of the presses for failure to comply. The abolition of the Star Chamber by the Long Parliament in 1641 brought the royal prerogative over the press to an end. The passage of the Licensing Acts by the same parliament in 1643 established parliamentary power, in place of royal prerogative, forbidding the printing of objectionable books.[8]

Opposition to control of the press grew more prevalent with the rise of literacy in England. Notable among the condemnations of the Licensing Acts was Milton's celebrated work, "Areopagitica," which was written to encourage the people of England to oppose those acts. Reacting to increased opposition, the restored monarchy under Charles II enacted a statute declaring that "the well-government and regulating of printers and printing presses was a matter to public care and concernment, and that by the general licentiousness of the late times many evilly disposed persons had been encouraged to print and sell heretical and seditious books."[9]

The increased opposition could not be stemmed even by Charles' drawing and quartering violators and destroying their works. Prosecution for violation of the printing ordinances and for seditious libel became a means of destroying political opponents and was administered by the king's justices most prejudicially.[10]

Opponents of the king financed secret printing operations. The English

Bill of Rights, enacted in 1685 after the Bloodless Revolution brought William and Mary of Hanover to the throne, established certain political rights of Englishmen but did not mention freedom of the press. Nevertheless, the control of the press was relaxed, and the Licensing Acts were permitted to expire. When Parliament attempted to re-enact the Licensing Acts in 1695, its failure to do so marked the end of prior censorship of the press in Britain.[11] Freedom of the press then meant the freedom from previous restraint, but "not a freedom from censure for criminal matter when published."[12] This principle was further enunciated by Lord Mansfield in his charge to the jury in Miller's Case in 1770:

> As for freedom of the press, I will tell you what it is; the liberty of the press is, that a man may print what he pleases without license, as long as it remains so the liberty of the press is not restrained.[13]

At the turn of the 18th century, the House of Commons, disturbed by an increase in criticism of its activites by certain publishers, decided to silence its critics. The first step was the attempt to re-enact the Licensing Acts. This failing, Parliament devised a new method of controlling the press: the stamp tax on newspapers and advertising, pressed in 1715.[14] This device was described by the American colonists as "taxes on knowledge."[15] In addition, the English law called for bonds from all publishers and newspapers as a "security for good behavior."

These laws were not eliminated in England until 1869[16]—a year after the adoption of the Fourteenth Amendment to the United States Constitution.[17]

The most effective argument of the case for the repeal of this tax was that of Sir Edward Bulwer-Lytton on March 26, 1855:

> Sir, the question really is between the tax collector and the public, and it is this—whether it is not time that we should enforce the great principle of the constitution of civil liberty and of common sense which says that opinion shall go free, not stinted nor filched away by fiscal arrangements, but subject always to the laws of the country against treason, blasphemy and slander.[18]

> It is superfluous to argue the principle that opinion should not be indirectly suppressed by a tax, when the boldest man among us dare not invade it by an open law, and, indeed, if we desired to do so, we have no longer the power.[19]

The repeal of the British newspaper stamp tax, on the ground that Parliament "no longer had the power" to restrain the press, put into effect in

England essentially the same immunity against abridgment of freedom of the press as was written into the Constitution of the United States by the First Amendment some 66 years earlier.

It is clear from our country's early constitutional history that resentment against these unpopular taxes and against the widespread uses by prosecutors of seditious libel as a means of controlling the press played a great role in the rising sentiment for independence in the American colonies. It is also certain that the newspaper taxes in England and the colonies had their effect upon the enactment of the First Amendment to the United States Constitution.

Colonial Period in America

> Our liberty depends in freedom of the press, and that cannot be limited without being lost —Thomas Jefferson

The seditious libel trial of John Peter Zenger[20] in New York—and his subsequent acquittal by the jury after a charge from the bench that the writing in question was seditious and that truth was no defense—points out the unpopularity of the seditious libel law. The jury apparently was persuaded by Zenger's attorney, Andrew Hamilton, that truth was a valid defense.[21]

Having decided to pursue the movement toward separation from England, the Continental Congress sought popular support for the cause. In its Address of the Continental Congress to the Inhabitants of Quebec, it declared that the colonists had five inviolable rights: representative government, trial by jury, liberty of person, easy tenure of land and freedom of press.[22]

The constitutions of the states of Virginia, Pennsylvania and Maryland, all enacted in the year of the revolution, included sections granting freedom of the press.[23] The states of Massachusetts and Delaware also enacted similar clauses in their constitutions in 1780 and 1782, respectively.[24] The Virginia Resolution of Independence, written before that state's constitution, contains this statement:

> The freedom of the press is one of the greatest bulwarks of liberty, and can never be restrained by any despotic government.[25]

The United States Constitution, as originally drafted, contained no section regarding the press.[26] During the debates in the drafting sessions one suggested clause read, "The liberty of the press shall be inviolably

preserved."[27] Convention members made little comment, but comments that were recorded at the state conventions on ratification reflect the strong feeling of that time toward this sacred freedom. Patrick Henry said:

> With respect to the freedom of the press, I need say nothing further; for it is hoped that the gentlemen who shall compose Congress will take care to infringe as little as possible on the rights of human nature.[28]

Hon. James Lincoln said:

> The liberty of the press was the tyrant's scourge—it was the true friend and finest supporter of civil liberty; therefore, why pass it by in silence?[29]

The suggestion to include freedom of the press in the Constitution was, however, rejected on the theory that the powers of Congress extend only to matters expressly delegated to it. Therefore, so long as freedom of the press was not mentioned, Congress would have no authority to legislate on the subject.[30] Others took the opposite position: that Congress had implied as well as express powers, and it was, therefore, necessary specifically to preclude Congress from legislating in the field of freedom of the press.[31]

When the Constitution was presented to the states for ratification, many objected to the lack of clauses protecting freedom of press and religion.[32] The states were persuaded to ratify the Constitution only on the understanding that a satisfactory Bill of Rights would be added.[33]

Adoption of the Bill of Rights

In the years before the adoption of the Bill of Rights, "freedom of speech was conceived of as giving a wide and genuine protection for all sorts of discussion of public matters."[34] That this was not a universally held view was pointed out by Benjamin Franklin, a noted printer, when he said:

> Few of us, I believe, have distinct ideas of its [freedom of press] nature and extent. . . . If it means the liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my share of it when our legislators shall please so to alter the law, and shall cheerfully consent to exchange my *liberty* of abusing others for the privilege of not being abused myself.[35]

At this time, the Supreme Court of Pennsylvania ruled that truth was not a

valid defense to libel, thereby diminishing the scope of this freedom.[36] It should be noted, however, that the English common law definition of libel or freedom of the press did not apply in the United States after the revolution.

> One of the objects of the revolution was to get rid of the English common law on liberty of speech and the press.[37]

These conflicting views left the perimeters of the freedom of the press undefined up to the date of the first session of Congress in 1789.

James Madison proposed to the First Congress nine amendments to the Constitution.[38] Madison, a shrewd politician, only proposed amendments that had a probability of passage in the states. He explained: "Nothing of a controvertible nature ought to be hazarded by those who are sincere in wishing for the approbation of two-thirds of each house, and three-fourths of the state legislatures. . . ."[39] With reference to freedom of the press, Madison made the following two proposals contained within two separate amendments:

> The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.[40]

☆☆☆

> No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.[41]

The first of the above proposals made by Madison, dealing with the freedom of the press, was considered the second clause of his proposed fourth amendment. The second proposal comprised his entire fifth amendment. Madison's proposals concerning trial by jury were contained in his proposed fifth and seventh amendments.[42] After much debate, Congress decided that all of Madison's proposed amendments should be sent to committee before being dealt with on the floor.[43]

On Tuesday, July 28, 1789, the Committee reported the amendments to the floor, labeling them "propositions."[44] Madison's two proposals regarding freedom of the press were altered in language, but left as two distinct amendments.[45] Of the nine amendments proposed by Madison, he considered the one relating to free speech, press and conscience "the most valuable amendment in the whole list."[46]

The "fundamental" rights provoked little discussion in either the House or the Senate; the other suggested amendments brought about sharp controversy. While some members of Congress were against the amendments, all were in agreement that those singled out by Madison should be included if the amendments were enacted.[47]

The debates leading up to and concerning the First Amendment leave "freedom of the press" undefined. An understanding of what was meant can be gleaned from the controversy that arose out of the Sedition Act (passed in 1798), during which Madison made it clear that the First Amendment was directed against both prior restraint and subsequent punishment.[48]

Madison also described the First Amendment as being the "essential difference between the British government and the American Constitution."[49] There have been assertions that Madison's statement is incorrect. Some authors say the First Amendment is the same as the laws of contempt of the British Government. One theory construes the First Amendment as enacting Blackstone's concept that "the liberty of the press . . . consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published."[50] This Blackstonian theory dies hard. Whether he stated that law correctly, an entirely different view of the liberty of the press was enacted in Fox's Libel Act, soon after Blackstone wrote, so that Blackstone's view does not even correspond to the English law of the last 150 years. At any rate, Blackstone is unfit to be an authority on the liberty of American colonists, as he upheld the right of Parliament to tax them and was pronounced by one of his colleagues to have been an anti-republican lawyer.[51] Not only is the Blackstonian interpretation of our free speech clause inconsistent with eighteenth-century history, it is contrary to modern decisions and wholly out of accord with a common-sense view of the relations of state and citizen. Judge Cooley, the eminent authority on constitutional law, made the following rebuttal to Blackstone:

> . . . The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications. . . . Their purpose [of the free-speech clauses] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a

> free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.[52]

It is clear that the authors of the First Amendment intended the constitutional protection to exceed the Blackstonian idea that liberty of the press supports nothing except a freedom from censorship.[53]

In 1788, after a long talk with Thomas Jefferson, Thomas Paine wrote:

> After I got home, being alone and wanting amusement I sat down to explain to myself (for there is such a thing) ideas of natural and civil rights and the distinction between them—I send them to you to see how nearly we agree.
>
> Suppose 20 persons, strangers to each other, were to meet in a country not before inhabited. Each would be a sovereign in his own natural right. His will would be his Law,—but his power, in many cases, inadequate to his right, and the consequence would be that each might be exposed, not only to each other but to the other nineteen.
>
> It would then occur to them that their condition would be much improved, if a way could be devised to exchange that quantity of danger into so much protection, so that each individual should possess the strength of the whole number. As all their rights, in the first case, are natural rights, and the exercise of those rights supported only by their own natural individual power, they would begin by distinguishing between those rights they could exercise fully and perfectly and those they could not.
>
> Of the first kind are the rights of thinking, speaking, forming and giving opinions, and perhaps all those which can be fully exercised by the individual without the aid of exterior assistance—or in other words, rights of personal competency.—Of the second kind are those of personal protection of acquiring and possessing property, in the exercise of which the individual natural power is less than the natural right.
>
> Having drawn this line they agree to retain individually the first Class

> of Rights or those of personal Competency, and to detach from their personal possession the second Class, or those of defective power and to accept in lieu thereof a right to the whole power produced by a condensation of all the parts. These I conceive to be civil rights or rights of Compact, and are distinguishable from Natural rights, because in the one we act wholly in our own person, in the other we agree not to do so, but act under the guarantee of society."[54]

While expounding on the Bill of Rights to the House of Representatives, Madison analyzed the various rights in terms of their origins:

> In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature. In other instances, they specify positive rights, which may seem to result from the nature of the compact. Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.[55]

A short time later, Madison proposed still another order for grading these rights. Some guarantees of the Bill of Rights, according to Madison, are asserted against the executive branch, others against the legislative branch, some against the federal government, and others against the state governments. Since, however, he believed the greatest danger lay in the democratic community, the "prescriptions in favor of liberty ought to be leveled in that quarter."[56] With this method of classifying, Madison thought the First Amendment must always be paramount.[57]

In the Senate, there was an attempt to limit the all-encompassing scope of Madison's freedom of speech and press proposal, by adding the words, "in as ample a manner as hath at any time been secured by the common law."[58] The rejection on the Senate floor of this suggested addition clearly indicates that the senators gave consideration to the fact that the freedom set forth in Madison's proposal was absolute, and on reflection decided it was their desire to have it absolute. After much debate, Madison's suggested amendments and the free press and speech language as proposed by the House were combined into one amendment dealing with freedom of religion, speech and press. This became Proposal Number Three.[59] It was sent to the states for ratification as Amendment Number Three of twelve suggested amendments.[60] The first and second proposed amendments, dealing with apportionment and pay to congressmen, were

not ratified by the required three-fourths of the state legislatures. As a result, the free speech-free press amendment moved from the third to become the First Amendment to the Constitution.

There was little debate over the freedoms included in this amendment. Many believed these freedoms were so fundamental that all people had access to them as a natural right, while other rights were granted only through the function of society. Thomas Jefferson commented in a letter to Edward Carrington:

> The basis of our government being the opinion of the people, the very first object would be to keep that right [of free press]; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government I should not hesitate a moment to prefer the latter.[61]

This view of the importance of the liberty of the press was not unique to Jefferson and his republican friends. Federalist John Marshall, responding to Talleyrand's request that the United States government take measures to curb anti-French publicity in the press, stated:

> The genius of the Constitution, and the opinions of the people of the United States, cannot be overruled by those who administer the government. Among those principles deemed sacred in America; among those sacred rights considered as forming the bulwark of their liberty, which the government contemplates with awful reverence, and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied: perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America. No regulations exist which enable the government to suppress whatever calumnies or invectives any individual may choose to offer to the public eye; or to punish such calumnies and invectives, otherwise than by a legal prosecution in courts which are alike open to all who consider themselves as injured.[62]

Chapter II

Free Press/Fair Trial, the First Amendment

Much of the interpretation of the First Amendment by the Supreme Court has involved conflict between the right of an accused person to an impartial jury and the right of the press to inform the public about the judicial process. But the process of interpretation at first centered around conflict between the right of the courts to preserve judicial discipline and the right of citizens to comment on the judicial process.

Before 1941, in cases involving contempt of court by publication, U.S. courts generally applied English law. Sir John Fox in his "The History of Contempt of Court," stated:

> The rules for preserving discipline essential to the administration of justice come into existence with the law itself, and contempt of court (contemptas curiae) has been a recognized phrase in English law from the twelfth century to the present.[1]

The present English contempt law was first set forth in the 1760s in *King v. Almon*.[2] There, in finding a bookseller guilty of constructive contempt in publishing a libel, the judge did not cite any authority but said such summary procedures were of "immemorial usage."

There were, however, few cases of contempt in England between 1765 and 1888, when the Law of Libel Act of 1888 was enacted.[3] Although the act granted newspapers permission to publish reports of a proceeding in progress, the press was restricted to the use of "fair and accurate" reports. If the material published was inadmissible into evidence, the report was not "fair and accurate." The act provided that, once a writ was issued, the case was considered pending, and the newspapers were restricted in their reporting.

Subsequent court cases strengthened the heavy hand of the act. In *Rex v. Davis*,[4] it was ruled that the newspaper may report what has taken place in open court, but any publication reasonably calculated to interfere with

the administration of justice is unlawful—and no actual interference need be shown. And in *Rex v. Editor of the Daily Mail*,[5] it was ruled that contempt is possible, depending on the circumstances of the case—even if there is no intention to interference—if the publication "might conceivably prejudice a pending trial."

In the United States, the courts were given almost unlimited contempt power until 1831, when, after a number of flagrant abuses of this power, Congress passed an act giving federal courts power to punish, among other things, misbehavior of any person in the presence of the court or "so near thereto as to obstruct the administration of justice."[6] In 1918, the heart was taken out of the 1831 statute when the Supreme Court in *Toledo Newspaper Co. v. United States*[7] held that "so near thereto" indicated a "reasonable tendency" rather than its obvious geographical meaning. It was not until 1941 that *Toledo* was overruled by *Nye v. United States*,[8] in which the court gave the geographical interpretation to "so near thereto," and a judge's power to punish summarily for constructive contempt was again limited, as was originally intended.[9]

Application of 'Clear and Present Danger' to Contempt

It was later in 1941 that the court decided the companion cases of *Bridges v. California* and *Times Mirror Co. v. Superior Court*.[10] For the first time, the clear and present danger test was applied to contempt by publication cases.

The clear and present danger test was first enunciated by Justice Oliver Wendell Holmes in 1919 in *Schenck v. United States*.[11] Charles T. Schenck had been convicted of inciting resistance to the World War I draft by circulating pamphlets. Mr. Holmes wrote:

> We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring

about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.[12]

The *Bridges* case came about after union leader Harry Bridges sent a public telegram to the secretary of labor calling a particular judge's decision outrageous and asserting that his union "did not intend to allow state courts to override the majority vote of members . . . and to override the National Labor Relations Board." The Supreme Court of California held that the publication of Bridges' telegram had a "reasonable tendency" to interfere with the orderly administration of justice and that freedom of expression was subordinate to judicial decorum.

The United States Supreme Court reversed the California decision, stating:

Here, as in the Nye case, we need not determine whether the statute was intended to demarcate the full power permissible under the Constitution to punish by contempt proceedings. But we do find in the enactment viewed in its historical context, a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as commands the breach of which cannot be tolerated.[13]

☆☆☆

History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case.[14]

☆☆☆

It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time

but upon the most important topics of discussion.[15]

☆☆☆

> But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases.[16]

In 1946, the Supreme Court reaffirmed its *Bridges* decision by overruling a contempt conviction in *Pennekamp v. Florida*[17] and holding that the petitioners' right of free expression in the press under the First and Fourteenth amendments was violated. The case involved the publication by the Miami Herald of two editorials critical of the administration of criminal justice in cases pending before the circuit court. The Supreme Court said:

> We must, therefore, weigh the right of free speech which is claimed by the petitioners against the danger of the coercion and intimidation of courts in the factual situation presented by this record.
>
> Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct. It does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to fair and orderly judicial administration. Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.[18]

What is meant by clear and present danger to a fair administration

> of justice? No definition could give an answer. Certainly this criticism of the judges' inclinations or actions in these pending nonjury proceedings could not directly affect such administration. This criticism of their actions could not affect their ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings. For such injuries, when the statements amount to defamation, a judge had such remedy in damages for libel as do other public servants.[19]

☆☆☆

> As we have pointed out, we must weigh the impact of the words against the protection given by the principles of the First Amendment, as adopted by the Fourteenth, to public comment on pending court cases. We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it.[20]

And again the next year, the Supreme Court followed in *Craig v. Harney*[21] the principles set forth in *Bridges*. There the publisher and certain members of the staff of a Corpus Christi, Texas, newspaper were found guilty of contempt for publishing an editorial and news stories critical of the judge's handling of a case. The newspaper called the judge's action "arbitrary" and a "travesty on justice." The Supreme Court reviewed the clear and present danger test, quoted from the *Pennekamp* case, and then stated:

> The history of the power to punish for contempt . . . and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice.[22]

☆☆☆

> In that sense the news articles were by any standard an unfair report of what transpired. But inaccuracies in reporting are commonplace. Certainly a reporter could not be laid by the heels for contempt because he missed the essential point in a trial or failed to summarize the issues to accord with the views of the judge

who sat on the case.[23]

☆☆☆

> This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him. . . ." The vehemence of the language used is not alone the measure of the power to punish for contempt. The fire which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.[24]

Since its decision in *Bridges*, the Supreme Court has never found the danger to the administration of justice in any of the cases that have come before it "clear and present" enough to justify punishment. In his dissenting opinion in *Craig v. Harney*, Justice Frankfurter recognized that:

> Hereafter states cannot deal with direct attempts to influence the position of a pending controversy by a summary proceeding, except when the misbehavior physically prevents proceedings from going on in court, or occurs within its immediate proximity.[25]

It has been argued that—although no clear and present danger to justice may exist where the individual allegedly influenced by the publication is a judge, whose judicial temperament enables him to disregard popular influences—this situation may be very different when a jury is involved.

This situation arose in 1950 in *Baltimore Radio Show v. Maryland*.[26] Three Baltimore radio stations broadcast a murder suspect's previous record and the fact that he had confessed. The accused waived his right to a jury trial on the ground that an impartial jury could not be found. The stations were found in contempt by the lower court because the broadcasts interfered with a fair trail. The Court of Appeals of Maryland reversed, following the Supreme Court rationale that there was no clear and present danger to justice. No longer in Maryland could a distinction be made between jury and non-jury cases. The Supeme Court subsequently denied a request that it review the fairness of the trial but stated that its denial was not an indication that it approved of the original decision.

Chapter III

Free Press/Fair Trial, the Sixth Amendment

Under the Sixth Amendment to the Constitution of the United States, and under every state constitution, the right of a criminal defendant to be tried by an impartial jury is expressly or implicitly guaranteed. The constitutions of 39 states have a guarantee of an impartial jury similar to that of the federal Constitution, and in the other 11 states, the guarantee is inferable from a right to a trial by jury.[1] Furthermore, a fair trial by an impartial jury is guaranteed in state cases by the due process clause of the Fourteenth Amendment.[2] With regard to the right to "a speedy and public trial by an impartial jury," the Supreme Court said in 1866:

> If ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to everyone accused of crime who is not attached to the Army or Navy or Militia in actual service.[3]

A difficult task in providing this right is determining whether a juror is impartial. Often a juror will unconsciously harbor bias that, regardless of his earnest intentions, he is unable to overcome. Through the years, the Supreme Court has set down guidelines that give trial judges great discretion in handling this problem.

News coverage of crime and courts may create prejudice or bias among jurors. News reports about the crime, the arrests or evidence that has been admitted at trial usually pose no problem. The two most often cited problem areas for trial courts are the publication of confessions or prior criminal records when they are not admissible as evidence. The Supreme Court stated in 1907 in *Patterson v. Colorado*:[4]

> The theory of our system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private or public print.

It is often difficult for a newspaper editor to foresee what may be an

outside influence on a trial. However, as will be seen from the cases below, the fact that a juror has been exposed to news coverage about a crime should not automatically disqualify him. If he indicates to the judge's satisfaction that he is able to set aside any opinion he may have developed as to the guilt or innocence of the accused, he may be considered a qualified juror.

When considering motions based on allegations of prejudicial pretrial publicity, courts have considered how vigorously the defendant and his counsel attempted to combat the potential prejudicial influence of the news coverage of the crime. The courts have considered whether the defendant was responsible for any of the pretrial news coverage, whether he took advantage of pre-trial interviewing, *voir dire*, to secure an impartial jury, whether he used all his peremptory challenges, whether he moved for a mistrial. Although these factors may not be the sole basis of a defendant's right to a new trial, they have often strongly influenced the courts.

Prejudicial Factors in Cases from 1851 to 1951

Many convictions have been reversed because of jury bias, but here we primarily are concerned with cases in which news coverage has been considered a prejudicial factor.

The first Supreme Court case of any significance on this subject was *United States v. Reid*,[5] a 1851 decision involving murder aboard an American ship on the high seas. The defendant asked the lower court for a new trial because of, among other things, the misbehavior of two jurors who read, while the trial was in progress, a newspaper account of the evidence that had been introduced. The defendant submitted affidavits of the two jurors indicating that they had read parts of the report, but that it did not influence their judgment. The justices were reluctant even to consider such affadavits but left that an open question saying:

> Because we are of opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decision, and both of them swear that these papers had not the slightest influence on their verdict.[6]

In 1878, the court decided *Reynolds v. United States*,[7] which set forth the first guidelines on this subject and has been quoted in many of the court's subsequent opinions. This was a bigamy case in which the defendant

argued, as two of his grounds for appeal, that the challenges of certain jurors by the accused were improperly overruled and that certain other juror challenges by the government were improperly sustained. In an attempt to analyze what is necessary in order that a juror be considered impartial, the court said:

> The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court.[8]

After considering the facts, the court found there was not such a manifestation of partiality as to leave nothing to the conscience or discretion of the triers even though the juror had some hypothetical opinion of the case. It was recognized that often the manner of the juror while testifying is more "indicative of the real character of his opinion than his words," that the trial judge is usually better able to assess the situation, that a reviewing court should not reverse rulings based on questions of fact except in clear cases. The court then stated:

> The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so.[9]

In 1886, the Supreme Court decided *Hopt v. Utah*,[10] a murder case wherein one of the grounds for appeal involved the ruling of the trial court on several challenges of the jurors. The Territory of Utah had, at the time, several acts regulating proceedings in criminal cases, including one that stated:

> No person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury [juror], founded upon public rumor, statements in public journals, or common notoriety; provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him.[11]

The defendant on appeal complained of the lower court's refusal to allow challenges for cause of four jurors. Three of the four were peremptorily challenged by either the defendant or the district attorney, and the defendant had several peremptory challenges that he had not used when the jury was completed.

Therefore, as to the three, the defendant's cause could not have been prejudiced because the defendant did not exhaust his peremptory challenges. The fourth juror admitted having heard of the case through the newspapers and that he had talked about it and that he had formed a qualified opinion, but that he did not think he had ever expressed that opinion. He went on to explain that it would take evidence to remove this opinion, but that he thought he could sit as a juryman as if he had never heard of the case and that what he had heard did not make the least difference. On cross examination he stated that he could sit on the jury and determine the case without reference to anything he had heard and that he was not conscious of any bias or prejudice that might prevent him from dealing with the defendant impartially and, that he thought he could try the case according to the law and the evidence. On re-examination, he stated that he would be guided by the evidence altogether, without being influenced by any opinion he might have.

The court in upholding the statute and refusing to reverse the defendant's conviction stated:

> By the express terms of the Statute of 1884 he could not be disqualified as a juror for an opinion formed or expressed upon statements in public journals, if it appeared to the court, upon his declaration under oath or otherwise, that he could and would, notwithstanding such an opinion, act impartially and fairly upon the

> matters submitted to him. We think that evidence, or what purports to be evidence, printed in a newspaper is a 'statement in a public journal' within the meaning of the statute, and that the judgment of the court upon the competency of the juror in such cases is inclusive.[12]

Note the difference between opinion and prejudice. A juror is competent, even though he has formed an opinion through reading a newspaper article, if he states he is without prejudice and will be impartial and decide the case only on the evidence and the law.

The next year, in 1887, the court decided *Ex Parte: Spies*.[13] Here the court dismissed an appeal from a conviction of murder. As one ground for appeal, the defendant challenged the validity of an Illinois statute that provided in part:

> . . . that it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence: and provided further, that in the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall upon oath state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement.[14]

The court cited *Hopt v. Utah*[15] to the effect that no injury is done the defendant if his challenge for cause is disallowed and he peremptorily challenges the juror if, after the jury is impaneled, he still has other preemptory challenges he could have used. The court stated that the Illinois statute was not repugnant to the constitution of that state, which has a provision regarding an impartial jury similar to that of the United States Constitution.

The court next addressed itself to those jurors challenged for cause and selected after the defendant had used all his peremptory challenges. Here again, the court displayed its unwillingness to overrrule a lower court judge who had personally witnessed the testimony of the jurors when they were examined. It should be noted that the statute says not only that the prospective juror must state upon oath that he believes he can "fairly and impartially render a verdict," but further that the court must be "satisifed of the truth of such statement."

The case of *Simmons v. United States*,[16] decided in 1891, was an appeal from a conviction of aiding and abetting an embezzler and misapplying funds. Here the lower court judge discharged the first jury impaneled upon learning that one of the jurors had sworn falsely when interviewed and that that juror and others had read an article placed in the newspapers by the defendant, commenting on the evidence. Upon being convicted by a second jury, the defendant complained of the discharge of the first. To this the Supreme Court stated:

> It needs no argument to prove that the judge, upon receiving such information, was fully justified in concluding that such a publication under the peculiar circumstances attending it, made it impossible for that jury, in considering the case, to act with the independence and freedom on the part of each juror requisite to a fair trial of the issue between the parties. The judge having come to that conclusion, it was clearly within his authority to order the jury to be discharged, and to put the defendant on trial by another jury.[17]

The court thus once again upheld a trial court judge's discretion in matters such as this.

In 1892, the Supreme Court decided the case of *Mattox v. United States*[18] involving a murder in Indian Territory that was part of the United States Judicial District of Kansas. The defendant submitted several affidavits of jurors, some of which stated that after the case had been submitted to the jury and while the jurors were deliberating but before they had agreed upon their verdict, a newspaper containing comment upon the case was brought into the jury room and read to the jury. The article stated that the defendant would be a lucky man if he was found not guilty because the evidence against him was very strong, that it was not expected the jury deliberation would last an hour and that the prosecuting attorney's speech was so strong that the defendant's friends "gave up all hope of any result but conviction." The affidavits did not indicate what influence, if any, the reading of the newspaper had on the jurors, but were confined to statements of what they had read.

The court concluded that, while the evidence of jurors as to the influences that affect their deliberation is inadmissible either to impeach or support the verdict, the court may consider an affidavit concerning any facts that might have a bearing on the question of the existence of extraneous influence. Therefore, the affidavits stating that the newspaper had been read by the jurors were admissible, but any statement as to the effect of the articles on the minds of the jurymen was inadmissible. The Supreme Court considered the exclusion of the affidavits by the District

Court as reversible error. Here, then, the reversal was based on exclusion of the affidavits by the District Court, rather than on the presence of the newspaper in the jury room.

Thiede v. Utah[19] was another case brought under the statute of the Territory of Utah.[20] One of the assignments of error was the overruling of the defendant's challenges for cause directed against four jurors who had testified during *voir dire* that they had read accounts in the newspaper concerning the murder involved, that they had formed certain impressions from their reading, but that they could lay aside these impressions and try the case impartially on the evidence presented. The court ruled that the jurors' testimony clearly placed them within the terms of the statute of the Territory of Utah, and there was no error in overruling the challenges.

In *Holt v. United States*,[21] in 1910, the Supreme Court affirmed the Circuit Court of the United States for the Western District of Washington on a conviction for murder committed on a military reservation. The defendant charged error because the lower court did not sustain a challenge for cause of one juror. The juror admitted he had taken the newspaper statements regarding the case as facts and that he had no opinion other than that derived from the papers, and that other evidence could change it very easily, although "it would take some evidence to remove it." He said he would make his decision according to the evidence or lack of evidence at the trial. Justice Holmes, in delivering the opinion of the court, stated:

> The finding of the trial court upon the strength of the juryman's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which it is far from being in this case.[22]

The defendant also argued that the jury had been allowed to separate, and during the separation some members of the jury had read a newspaper article concerning the case. The court said that, although the jurors may have read matter concerning the case, it is not to be inferred that prejudice resulted. Justice Holmes stated:

> If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.[23]

The court, therefore, confirmed its rulings in previous cases that a juror can be competent even though he has formed an opinion and that questions as to a juror's partiality are questions of fact to be determined by

the trial judge and not to be reversed except "in very plain circumstances indeed."

This case further buttresses the rule that the newspaper article involved must not only be capable of influence, but must in fact influence.

One of the more notable cases in this field was the 1919 first degree murder trial of Robert F. Stroud,[24] known as the Birdman of Alcatraz, for the murder of a guard at Leavenworth prison in Kansas. One of the principal grounds upon which reversal was sought was that the lower court erred in not granting a change of venue. Before the trial, the local press had printed some of the testimony for the government from former trials of this same case. The judge excluded residents of Leavenworth County from the jury but refused to grant a change of venue. Leavenworth was one of 50 counties in the judicial division from which the jurors were selected. Certain jurors were challenged for cause on the ground that they favored capital punishment in cases of conviction for first degree murder. The court recognized that one of these challenges should have been sustained. But because the man was peremptorily challenged and did not sit on the jury, and because the defendant was given two more peremptory challenges than the law required, the appellant's cause was not prejudiced by the erroneous ruling. The court was unable to find that any of the jurors who heard the case were objectionable and, therefore, refused to reverse the lower court's decision.

This case perhaps best serves as an example of the use of safeguards available to insure that the defendant receives a trial by an impartial jury and that the question of which safeguards should be invoked is best left to the discretion of the trial judge. Here the judge did not believe the newspaper publicity required a change of venue, but in excluding residents of Leavenworth County from the jury, he in effect gave the defendant a change of venire.

Brief mention should be made of the case of *Moore* v. *Dempsey*.[25] Five blacks convicted by a trial court in Arkansas for killing a white man appealed their convictions of first degree murder. The convictions were reversed, but not because of newspaper coverage. The case so infected the emotions of the entire community that the Supreme Court concluded a fair trial would have been impossible. ". . . no juryman could have voted for an acquittal and continued to live in Phillips County . . . ," the court said.

Berry's World

"PSST! BETTER COMB YOUR HAIR! WE'RE BEING TELEVISED."

New Wave of Cases Beginning in 1951

Except for the case of *Moore v. Dempsey*[26] and a relatively insignificant case called *Buchalter v. New York*,[27] there were few cases on this subject between 1919 and 1951, the subject seeming to have been laid at rest by the Supreme Court's earlier opinions. In *Buchalter*, the appellant referred to unfair and lurid newspaper publicity and said the lower court had erred in its rulings on challenges of prospective jurors and in its refusal to grant a change of venue. The court stated that it had reviewed the record and was unable to conclude that a "convincing showing of actual bias on the part of the jury which tried the defendant is established."

Starting in 1951 with *Shepherd v. Florida*,[28] the court considered a new wave of cases concerning jury prejudice allegedly created by the news media. In *Shepherd v. Florida*,[29] the defendants, four blacks, were tried in Lake County, Fla., and convicted of the rape of a white girl. Again, there was the problem of community prejudice, with feelings running so high that the defendants had been threatened with lynching. One defendant's parents' home had been burned, as had the homes of two other black families. The National Guard had been called to protect other blacks, and some blacks were forced to flee the community. The newspapers had quoted the sheriff as saying the defendants had confessed. No confession was offered at the trial. Motions for a continuance and a change of venue were denied. The Supreme Court reversed, but only on the grounds of discrimination in selection of the jury, not because of newspaper coverage. Justice Jackson, however, was joined by Justice Frankfurter in a concurring opinion that they would have reversed because of the "prejudicial influences outside the courtroom," particularly the news coverage. Jackson said:

> But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated.[30]

The concurring opinion cited the three leading contempt cases[31] that the court had recently decided and recognized that, in light of these cases, it was difficult for a trial judge to deal with press interference with the trial process. Jackson said, however:

> But if freedoms of press are so abused as to make fair trial in the locality impossible, the judicial process must be protected by

> removing the trial to a forum beyond its probable influence. Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to a fair trial. These convictions, accompanied by such events, do not meet any civilized conception of due process of law. That alone is sufficient, to my mind, to warrant reversal.[32]

The next year, in 1952, the Supreme Court again was confronted with a claim that a trial lacked fundamental fairness because of the circumstances surrounding it. In *Stroble v. California*,[33] the defendant was convicted of the first degree murder of a six-year-old girl. He had previously been arrested for molesting a small girl. Excerpts of a confession were released to the newspapers by the district attorney, who at the same time offered his opinion that the defendant was both guilty and sane. The defendant was arraigned the next morning. One of the principal allegations supporting the claim of an unfair trial was the publication of inflammatory newspaper reports inspired by the district attorney. The papers had labeled the defendant a "werewolf," "fiend" and "sex mad killer." The Supreme Court affirmed the conviction and rejected the contention that unfairness or prejudice resulted from the publication of the confession in the newspaper. Because the confession was read into the record at the preliminary hearing four days after the newspaper account was published, the court believed the defendant had not been prejudiced:

> Petitioner's trial itself was reported by Los Angeles newspapers, usually on inside pages. Petitioner makes no objection to this phase of the newspaper coverage except for the newspapers' occasional reference to petitioner as a 'werewolf.'
>
> While we may deprecate the action of the district attorney in releasing to the press, on the day of petitioner's arrest, certain details of the confession which petitioner made, we find that the transcript of the confession was read into the record at the preliminary hearing in the Municipal Court on November 21, four days later. Thus, in any event, the confession would have become available to the press at that time. Petitioner has not shown how the publication of a portion of that confession four days earlier prejudiced the jury in arriving at their verdict two months thereafter.[34]

The court stated that the petitioner had failed to show that the newspaper accounts "aroused against him such prejudice in the community as to necessarily prevent a fair trial." The court remarks with

reference to the petitioner's failure to move for a change of venue were significant:

> At the outset, it should be noted that at no point did petitioner move for a change of venue, although the California Penal Code explicitly provides that whenever 'a fair and impartial trial cannot be had in the county' in which a criminal action is pending, the action may, upon motion of the defendant, be removed to 'the proper court of some convenient county free from a like objection.' Of course petitioner's failure to make such a motion is not dispositive of the issue here, since the state court did not decide against petitioner on this ground but rather rejected on the merits his federal constitutional claim.[35]

The court further suggested that it was significant that petitioner's counsel saw no need to seek a transfer of the action to another county because of the prejudicial newspaper accounts. The court noted that the matter of the newspaper accounts was first brought to the trial court's attention after the defendant's conviction, in support of a motion for a new trial. In answer to this contention, the trial court stated that the jurors all had been thoroughly examined and had definitely stated that the defendant would be given the benefit of the presumption of innocence, and that there is nothing to show that the jurors ever saw or read the newspapers. Of this finding by the trial court, the Supreme Court stated:

> Petitioner does not challenge this statement of the court. Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. He asks this court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury. It is also significant that in this case the confession which was one of the most prominent features of the newspaper accounts was made voluntarily and was introduced in evidence at the trial itself.[36]

Justice Frankfurter dissented from the court's refusal to reverse the petitioner's conviction. He was worried by the argument that the trial lacked fundamental fairness, particularly because it was a district attorney who

had initiated the stories carried by the news media. Here Frankfurter again brought to the fore the view earlier expressed by Justice Jackson and himself in *Shepherd v. Florida* of news concerning a defendant before trial. Thus the British concept, to which Frankfurter remained wedded for the rest of his life, began to appear in dissenting opinions of the court:

> Jurors are of course human beings and even with the best of intentions in the world they are, in the well-known phrase of Holmes and Hughes, JJ., "extremely likely to be impregnated by the environing atmosphere." Precisely because the feeling of the outside world cannot, with the utmost care, be kept wholly outside the courtroom every endeavor must be taken in a civilized trial to keep it outside. To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial, is to make the state itself through the prosecutor who wields its power a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice.[37]

☆☆☆

> And so I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of "the traditional concept" of the "American way of the conduct of a trial."[38]

It is interesting to note that the court, in considering the likelihood of partiality existing in the jury, considers the lapse of time between the damaging publicity and trial; that if publicity of doubtful admissibility is subsequently admitted as evidence, the defendant cannot complain of being prejudiced; that a defendant must prove actual rather than speculative prejudice, and that the court looks unfavorably on publicity initiated by the prosecutor or other representatives of the state. As in previous cases, the fact that the defendant had not used all possible procedures to remedy the pre-trial publicity was considered significant, but not dispositive. Thus, in *Stroble v. California*[39] the court reaffirmed its traditional views. Much comment resulting from this case showed that a segment of jurists and lawyers were interested in adopting the minority views of Jackson and Frankfurter as expressed in *Shepherd*[40] and *Stroble*. It is from these dissenting opinions that one may conclude that the free press-fair trial dialogue began.

Later in 1952, the Supreme Court considered another case involving a newspaper article in *Leviton v. United States*.[41] The defendant's petition for writ of *certiorari* was denied, but Justice Frankfurter filed a memorandum, indicating that he thought it would be helpful in understanding the exercise of the court's discretionary jurisdiction in granting or denying *certiorari*. In this case, a copy of a newspaper containing erroneous information as to the facts of the case had been found in the jury room. Justice Frankfurter quoted from the court of appeals majority and dissenting opinions. The majority opinion stated in part:

> We do not think, however, such a report, erroneous as it was, made a fair trial impossible. The judge gave very explicit instructions that the contents of the article were to be disregarded and went on to point out how the offenses set forth in the indictment differed from those described in the article. Trial by newspaper may be unfortunate, but is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan centers may well prove impossible.[42]

The court of appeals dissent stated in part:

> My colleagues admit that "trial by newspaper" is unfortunate. But they dismiss it as an unavoidable curse of metropolitan living (like, I suppose, crowded subways). They rely on the old ritualistic admonition to purge the record. The futility of that sort of exorcism is notorious. As I have elsewhere observed, it is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant. Justice Jackson, in his concurring opinion in *Krulewitch v. United States*, said that, "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."[43]

In 1956, in *U.S. ex rel Darcy v. Handy*,[44] the court again refused to reverse a conviction after it was told that publicity had tainted the trial. The petitioner had been convicted of murder and sentenced to death. There were four defendants involved in a robbery-murder, but on motion by counsel, the cases were severed so that the petitioner's case was heard separately from the others. One of the petitioner's objections was the fact that two of the four defendants involved were tried just a week before his trial and that he suffered from the attendant adverse publicity. The court stated that there was no indication of an atmosphere of hysteria and prejudice and that the proceedings were factually reported in the press. The court

reiterated the fact that it was incumbent on the petitioner to show the unfairness of his trial:

> While the court stands ready to correct violations of constitutional rights, it also holds that "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."[45]
>
> We have examined petitioner's allegations, the testimony and documentary evidence in support thereof, and his arguments. We conclude that the most that has been shown is that, in certain respects, opportunity for prejudice existed. From this we are asked to infer that petitioner was prejudiced.[46]

The court next discussed the safeguards afforded any defendant, including examination of potential jurors and the right of peremptory challenge. Also mentioned was the protection available through severance of the trials of the defendants and, further, the protections afforded by continuances and changes of venue:

> In the instant case, notwithstanding the fact that competent counsel for petitioner did not use all of his peremptory challenges after a searching examination of prospective jurors on *voir dire*, and did not seek a continuance of the trial or a change of venue, petitioner asks this court, in effect, to infer that the news coverage of the robbery and proceedings prior to petitioner's trial, including the Foster-Zeitz trial, created such an atmosphere of prejudice and hysteria that it was impossible to draw a fair and impartial jury from the community or to hold a fair trial. The failure of petitioner's counsel to exhaust the means provided to prevent the drawing of an unfair trial jury from a community allegedly infected with hysteria and prejudice against petitioner while not dispositive, is significant.[47]

Justice Harlan, Frankfurter and Douglas dissented on other grounds.

All of the cases considered thus far have been state cases presented to the Supreme Court on the basis of the denial of due process under the Fourteenth Amendment. In 1959, however, in the case of *Marshall v. United States*,[48] an individual was convicted in the United States District Court in Colorado on a charge of unlawfully dispensing drugs in violation of a federal statute. The court granted *certiorari* because of doubts whether exposure of some of the jurors to newspaper articles was "so prejudicial in the setting of

the case as to warrant the exercise of our supervisory power to order a new trial." Here the Supreme Court clearly indicated that it was exercising its general supervisory power over the lower federal courts and was not limited, as in state cases, to determining whether or not "due process" had been afforded the defendant. The newspaper accounts told of the petitioner's previous record of convictions and contained other potentially prejudicial information involving evidence found at the time of arrest. The trial judge, on learning that the jury had read these news accounts, interviewed the jurors and was told that they would not be influenced by the news articles and that they could decide the case only on the evidence and that no prejudice had resulted from the reading of the articles. The court recognized that the trial judge has great discretion on ruling on matters such as this but stated:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence.[49]

The court then again made it clear that it was acting in its supervisory capacity:

> In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts, we think a new trial should be granted.[50]

In 1961, the court granted *certiorari* in *Janko v. United States*,[51] another case emanating from a federal court. The defendant had been convicted of income tax evasion. There had been newspaper and radio accounts of the defendant's former convictions, including a prior conviction in the present case that had been set aside. The jurors had, however, been warned on several occasions not to read these accounts and when asked generally by the judge whether they had been influenced by any outside sources, they replied they had not. The issue raised in the court of appeals was that four members of the jury had read newspaper articles. In an unusual move, the Supreme Court granted the petition for *certiorari* and reversed and remanded the case all in the same memorandum. No opinion was issued by the Supreme Court. Here, the court was again exercising its supervisory power over the lower federal courts, and this case added nothing to the law already established in the *Marshall* case.

Fair Trial for 'Mad Dog' Irvin

Also in 1961, the court decided what is considered by many to be the most important case on this subject, *Irvin v. Dowd*.[52] Irvin, the petitioner, had been indicted for murder in Indiana and because of the publicity surrounding the crime of which he was accused, he was granted a change of venue to an adjoining county, but was denied a continuance. He was convicted in the second county and sentenced to death. His appeal to the Supreme Court was based on an alleged violation of due process in that he did not receive a fair trial. Six murders had been committed in December 1954. Irvin was arrested in April 1955, and soon after, police officials issued press releases that he had confessed to the six murders. Opinions about his guilt and the punishment he should receive were solicited on the streets and broadcast over local radio stations. Scores of newspaper headlines, pictures, cartoons and articles were printed in newspapers delivered to about 95 percent of the homes in the second county in which he was tried. The newspaper and radio stories included references to his juvenile record, his convictions for arson and burglary and his military courtmartial. In addition, these stories accused him of being a parole violator and stated that he had confessed to the six murders and had been indicted for four of them. Additionally, the press reported Irvin had offered to plead guilty if spared the death sentence, a penalty the prosecutor was nonetheless determined to secure. Irvin was described as the "confessed slayer of six" who also had confessed to 24 burglaries.

In looking at the jury, the court found that the panel consisted originally of 430 persons. The trial court excused 268 on challenges for cause; 103 were excused because of conscientious objection to the death penalty, and the maximum of 20 peremptory challenges was used by the petitioner. The state used only 10 peremptory challenges. The *voir dire* record covered 2,783 pages and indicated that 90 percent of those examined on the point entertained some opinion as to guilt "ranging in intensity from mere suspicion to absolute certainty." Additionally, out of the twelve jurors finally selected, eight thought Irvin was guilty.

The court held that a juror who has formed an opinion cannot be impartial, but it went on to state:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have

> formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.[53]

The court then stated the tests set forth in *Reynolds*,[54] including the fact that the affirmative of the issue is upon the challenger, that he must show the actual existence of prejudice, and that the finding of the trial court "ought not to be set aside by a reviewing court unless the error is manifest." But the court felt here that the buildup of prejudice was clear and convincing and that the bias was manifest. It noted that two-thirds of the jurors believed that Irvin was guilty, had heard or read information that was inadmissible at trial and openly admitted their prejudices. But each said he could be fair and impartial. To this the court replied:

> Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.[55]

And the court concluded that the circumstances were such that a reversal was mandatory:

> With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.[56]

Justice Frankfurter wrote a concurring opinion in which he stated:

> How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.[57]

In analyzing this case, it must first be noted that the facts as to pre-trial news coverage were the most extreme seen by the court to that date. Aside from the general circumstances of deep and bitter prejudice, and aside from the revealing *voir dire* record of 2,783 pages that showed that eight out of the 12 jurors finally selected thought Irvin was guilty, it should be noted

that the newspaper articles contained the two items considered by a majority of the courts as the most harmful to the defendant; namely, his prior criminal record and the fact of a confession.

That it was the extreme nature of the factual situation that caused reversal by the Supreme Court rather than any revolutionary trend, was borne out the following year. In 1962, the court declined to reverse a Washington state court in the case of *Beck v. Washington*.[58] Dave Beck, a labor union officer, had been convicted of embezzling union funds. His appeal to the Supreme Court was based primarily on the due process and equal protection clauses of the Fourteenth Amendment, in that adverse publicity had prevented the selection of a fair jury. Beck had moved to have the indictment quashed, moved three times for continuances and moved for a change of venue, which motions were all denied.

The newspaper stories centered around the fact that large amounts of money had been taken from the teamster labor union treasury and used for Beck's personal benefit. Much was also made of the fact that Beck had taken the Fifth Amendment a number of times during the hearing before the Select Committee on Improper Activities in the Labor or Management Field of the United States Senate. In his objection to the grand jury impaneled, Beck did not contend that any particular juror was prejudiced or biased, but rather that the judge had failed to ascertain on *voir dire* whether the adverse publicity had influenced any of the jurors, and further that the judge had failed to adequately instruct the grand jury as to prejudice.

The court rejected these arguments, stating that Beck was furnished an unbiased grand jury and that the judge's instructions were adequate. The court noted as to the instructions that for the trial judge to have dwelt on the matter of the adverse publicity and Beck's taking of the Fifth Amendment before the Senate committee, he would have only added fuel to the fire and been more harmful to Beck in the long run.

Beck's objections to the petit jury again do not single out any particular juror as being prejudiced, but rather state that the publicity surrounding the trial automatically prevented the selection of a fair jury and that any jury selected from the area in which he was tried must be presumed biased. The court pointed out that Beck's trial came some nine months after he first appeared before the Senate committee and five months after his indictment and that the intensity of news coverage had greatly diminished by the trial date. Additionally, the court characterized the news accounts at the time of the trial as being "straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness." As to the jury itself, all persons summoned as prospective jurors in the trial of Beck's father a

month before were excused, as were all persons who had been in the courtroom at any time during his father's trial. Of 52 persons examined, only eight admitted any bias or even opinion as to Beck's guilt. Six others suggested they might be biased or might have formed an opinion. All 14 of these were excused, as were all jurors challenged for cause by Beck's counsel. Beck also exercised all six peremptory challenges allowed him. On *voir dire*, each juror selected indicated that he was not biased and that he had formed no opinion as to Beck's guilt that would require any evidence to remove. After studying the *voir dire*, the court stated that each juror's qualifications as to impartiality were far greater than that required by the court in prior cases. Reference was made to the portion of the *Irvin v. Dowd*[59] decision holding that the existence of a preconceived notion is not enough by itself when the juror can lay aside any opinion he might have and base his verdict on the evidence.

The court stated:

> We cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or preformed opinion as a matter of law Compare *Irvin v. Dowd*, where sensational publicity adverse to the accused permeated the small town in which he was tried, the voir dire examination indicated that 90% of 370 prospective jurors and two-thirds of those seated on the jury had an opinion as to guilt, and the accused unsuccessfully challenged for cause several persons accepted on the jury.[60]

The court's refusal to reverse *Beck v. Washington* clearly indicates that *Irvin v. Dowd*[61] was no radical departure from past precedents, but was rather a result compelled by an extreme situation.

Note, that in the *Beck* case the court thought it significant that Beck did not challenge for cause any of the jurors ultimately selected. The court also quoted *Darcy v. Handy*[62] that the burden of showing the essential unfairness should be sustained by the petitioner and that the showing should be a "demonstrable reality," not just mere speculation. Neither Justice Frankfurter nor Justice White took part in the consideration or decision of the case. Justice Black, joined by Chief Justice Warren, dissented.

News Coverage and Due Process in Sheppard Case

The next step came when Dr. Sam Sheppard told the Supreme Court justices he was denied due process because of the prejudicial news coverage during his trial for the murder of his wife in 1954.[63] Because of the clarity of the opinion and because it needs no interpretation, here is Justice Tom Clark speaking for the court concerning the trial court events.:

> The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.
>
> The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in *Estes*, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits laying on the counsel table during recesses.
>
> Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the

courtroom during the trial, full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule.

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion. That the judge was aware of his responsibility in this request may be seen from his warning to Steve Sheppard, the accused's brother, who had apparently made public statements in an attempt to discredit testimony for the prosecution. The judge made this statement in the presence of the jury:

"Now, the court wants to say a word. That he was told—he has not read anything about it at all—but he was informed that Dr. Steve Sheppard, who has been granted the privilege of remaining in the courtroom during the trial, has been trying the case in the newspapers and making rather uncomplimentary comments about the testimony of the witnesses for the state.

"Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the courtroom during the progress of the trial if he is to be a witness in the case.

"The court appreciates he cannot deny Steve Sheppard the right of free speech, but he can deny him the . . . privilege of being in the courtroom, if he wants to avail himself of that method during the progress of the trial."

Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that "misrepresented entirely the testimony" in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when a news media makes it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the Coroner.

The story that Sheppard had been called a "Jekyll-Hyde" personality by his wife was attributed to a prosecution witness. *No such testimony was given.* The further report that there was a "bombshell witness on tap" who would testify as to Sheppard's "fiery temper" could only have emanated from the prosecution. Moreover, the newspapers described in detail clues that had been found by the police, but not put into the record.

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. Effective control of these sources—concededly within the court's power—might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment.

More specifically, the trial court might well have proscribed extra-judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; and belief in guilt or innocence; or like statements concerning the merits of the case. Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees. In addition, reporters who wrote or broadcasted prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings. The judge was put on notice of such events by defense counsel's complaint about the WHK broadcast on the second day of trial. In this manner, Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extra-judicial statements.

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the

> pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. Ohio has now adopted the requirement that juries in capital cases be sequestered during the proceedings without motion from defense counsel, apparently as a result of the Sheppard experience. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interference. Neither prosecutors, counsel for defense, the accused witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.
>
> Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition. The case is remanded to the district court with instructions to issue the writ and order that Sheppard be released from custody unless the state puts him to its charges again within a reasonable time.

It is clear from the quoted opinion that the Supreme Court recognized that the primary fault in the handling of this case was the failure of the trial judge to properly control his courtroom. In addition, the failure of public officials and members of the bar on both sides of the case to act within their stated codes of ethics permitted Sheppard's jury to become prejudiced against him. Nowhere in the court's opinion does Justice Clark evoke any conflict between First and Sixth Amendment rights and duties. It is implicit in the opinion that the court viewed the lack of restraint on the part of the

press as objectionable:

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent.[64]

The burden, however, under the court's opinion falls squarely on the shoulders of bench, bar and public officials, all of whom are charged with a duty to prevent a carnival atmosphere from arising.

In light of the foregoing, it should be useful to outline the Supreme Court's summary of the situation that brought about the court's opinion.

On July 4, 1954, Marilyn Sheppard, the pregnant wife of Dr. Sheppard, was bludgeoned to death in their home in a Cleveland suburb. According to Dr. Sheppard, he was asleep on the couch when he heard his wife cry out in the early morning hours. Dr. Sheppard then told of his encounter with a "form" beside his wife's bed and of his subsequent struggle with this "form" and being rendered unconscious by a blow on the back of the neck. He told of regaining consciousness and pursuing the "form" out the door to the shore of the lake in front of his home. He struggled with the "form" and was again knocked unconscious. He regained consciousness and returned to the house and notified the mayor of the village. Dr. Sheppard was taken to the nearby family-operated clinic to have his injuries taken care of.

After outlining Sheppard's story of his wife's death, the Supreme Court opinion tells of the news coverage of the case from the first day through the trial.[65]

The newspapers ran front page editorials that somebody was "getting away with murder" and asked, "Why No Inquest? Do It Now, Dr. Gerber." Dr. Gerber, the coroner, called an inquest the same day. This was a hearing broadcast throughout the gymnasium where it was held with live microphones placed at the coroner's seat and witness stand. While Sheppard's attorneys were present during the three-day inquest, they were not permitted to participate and, in fact, when his chief counsel attempted to place some documents in the record, the coroner forcibly ejected him from the room amid cheers from the audience. The newspapers pointed out discrepancies in Sheppard's statements, told of evidence that never was produced at the trial, stressed his extramarital love affairs and demanded Sheppard's arrest.

With his arrest on the evening of July 30, there was no letup in the coverage of the case. The court pointed out reports of clues found that in fact never existed, cartoons chiding him for his reluctance to help solve the case and a photograph that had been retouched to indicate to the

newspaper reader that Sheppard was the murderer.

The next section of the Supreme Court decision describes the conditions in the courtroom at the time of the trial. It was a small room, 26 by 48 feet, and newsmen were seated inside the bar just behind the defendant and within three feet of the jury box. There were television and newsreel cameras outside of the courthouse, and photographers and television personnel with all their equipment filled the corridors outside the courtroom. This continued throughout the nine weeks of the trial.

Every juror, except one, testified on *voir dire* to having read about the case or having heard broadcasts about it. At least seven of the 12 jurors had one or more Cleveland papers delivered to their homes.

The decision outlines a series of events occurring during the trial that further prejudiced Sheppard's case, and the court concludes that all of this activity by the news media interfered with the trial itself.

The court, however, reiterated its longstanding position on freedom of the press:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and the judicial processes to extensive public scrutiny and criticism. This court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for "(w)hat transpires in the court room is public property."[66]

The important fact is that, despite the extreme behavior of the news media, recognized even by the media and deplored by the court, the decision places the ultimate blame squarely on the shoulders of the trial judge for allowing the situation that existed to come to pass.

Although the court talks in terms of the trial judge's duty to retain control of the courtroom and its environs during the trial, there is no mention in the opinion of curtailing the rights the press has enjoyed historically under the First Amendment. Further, there is no suggestion that contempt power or other sanctions be invoked against the press.

The crux of the Sheppard decision is simply stated at the end, when the court says the remedy for the situation that developed lies not in restricting the press, but rather in protecting the accused through the procedural safeguards which should be available to every defendant. The court stated:

> Of course, there is nothing that proscribes the press from reporting

> events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.[67]

Eleven such procedural safeguards are available to protect the trial of an accused from external influences. Some of these safeguards can be invoked before the trial, some during the trial and some after the trial. These safeguards are change of venue, change of venire, continuance, severance, *voir dire* blue ribbon juries, isolation of the jury, instructions, retrial, appeal, and habeas corpus.

If the Supreme Court considers that the existing procedural remedies would have been adequate to cope with the unparalleled amount of public attention focused on the Sheppard case, it is difficult to conceive of any situation in which those same procedural safeguards would not be adequate to protect any defendant.

Trial Approved for 'Murph the Surf'

As an example, in 1975, in *Murphy v. Florida*,[68] the court once again refused to reverse a conviction wherein it was alleged that publicity surrounding the trial had deprived the defendant of due process. In so doing, the court clarified its ruling in *Marshall v. United States*.[69]

Jack Roland Murphy had been convicted of breaking and entering a home with intent to commit robbery. Justice Marshall, writing for the majority in the 8-1 opinion of the Supreme Court, stated:

> The robbery and petitioner's arrest received extensive press coverage because petitioner had been much in the news before. He had first made himself notorious for his part in the 1964 theft of the Star of India sapphire from a museum in New York. His flamboyant life style made him a continuing subject of press interest; he was generally referred to—at least in the media—as 'Murph the Surf'."[70]

The court notes that the record in the case contains scores of articles

reporting on Murphy's trials and tribulations and many quoting statements by Murphy or his attorney to reporters. When jury selection commenced, 78 jurors were questioned. Of these, 30 were excused for miscellaneous personal reasons; 20 were excused peremptorily by the defense or prosecution; 20 were excused by the court as having prejudged Murphy, and the remaining eight served as the jury and two alternates. Murphy moved to dismiss the chosen jurors on the ground that they were aware that he had been previously convicted of either the 1964 Star of India theft, or of a murder in another county. This motion, along with a motion for change of venue based on allegedly prejudicial pretrial publicity, was denied.

The U.S. Supreme Court granted *certiorari*.

The court in its opinion stated that its previous opinion in *Marshall v. United States*[71] was applicable only to federal courts and that its reversal in that case was based wholly on its supervisory power and not as a matter of constitution compulsion.

The court pointed out that the news articles concerning Murphy had appeared almost entirely during a two-year period ending seven months before the jury in this case was selected, and it described the stories as "largely factual in nature."

The court stated:

> The length to which the trial court must go in order to select jurors who appear to be impartial is another factor relevant to evaluating those jurors' assurances of impartiality. In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question, for it is then more probable that they are a part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it. In *Irvin v. Dowd*, for example, the court noted that 90 percent of those examined on the point were inclined to believe in the accused's guilt, and the court had excused for this cause 268 of the 430 veniremen. In the present case, by contrast, 20 of the 78 persons questioned were excused because they indicated an opinion as to petitioner's guilt. This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.
>
> In sum, we are unable to conclude in the circumstances presented in this case, that petitioner did not receive a fair trial. Petitioner has failed to show that the setting of the trial was inherently prejudicial or that the jury-selection process of which he complains permits an

inference of actual prejudice. The judgment of the court of appeals must therefore be affirmed.[72]

Also in 1975, the U.S. Court of Appeals for the Seventh Circuit in the case of *Chicago Council of Lawyers v. Bauer*,[73] held that "no-comment" rules of the District Court for the Northern District of Illinois deprived lawyers of their free speech rights under the First Amendment. The plaintiff in the case argued that the so-called "no-comment" rules unconstitutionally restricted lawyers' rights to comment publicly on pending litigation, and to hear and read such public comment by other lawyers, and that the rules were not restricted to situations that presented "a clear and present danger of a serious and eminent threat to the administration of justice."

The circuit court, while holding that the rules could not be categorized as prior restraints, did hold that the language of the rule stating, "if there is a reasonable likelihood that such dissemination will interfere with the fair trial or otherwise prejudice the due administration of justice," was overbroad and therefore did not meet constitutional standards. The court stated that only comments posing a "serious and eminent threat" of interference with the fair administration of justice can be constitutionally proscribed.

Through the foregoing cases, the development of the law in this area can be seen clearly. Although it would be difficult to deny that the court has afforded defendants a growing degree of protection from influences emanating from outside the courtroom, in only two cases involving a conviction in a state court—*Irvin v. Dowd*[74] and *Sheppard v. Maxwell*[75]—has the Supreme Court reversed the lower court on due process grounds because a fair trial in the particular locality involved was made difficult by news coverage of the crime and the trial.

The two important cases in which the court spoke of inherent prejudice, as opposed to specific prejudice, involved television coverage. The law, set down in *Reynolds v. United States*,[76] therefore, remains substantially intact in regard to newspaper coverage. As can be seen in *Sheppard v. Maxwell*,[77] the Supreme Court has not changed its views in this area. The court continues to consider the present legal safeguards as adequate to protect an accused and does not attempt to limit in any way freedom of the press.

Trial judges, however, continue to take steps they believe are necessary "in the interest of a fair trial."

"THAT'S NOT WHAT IT SAYS HERE!"

Gag Orders for News Reporters

The Supreme Court in *Sheppard v. Maxwell* noted that, from the cases it had been reviewing, "unfair and prejudicial news comment on pending trial has become increasingly prevelant."[78] The court said in 1966:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighted against the accused.[79]

In 1972 U.S. District Judge E. Gordon West took strong measures indeed when he issued an order that prohibited reporting of testimony taken at a pretrial hearing of a VISTA worker who had been indicted for conspiring to murder the mayor of Baton Rouge, La. Judge West cited reporters Larry Dickinson and Gibbs Adams for contempt after they wrote articles for their newspapers summarizing the day's testimony in detail.[80] The reporters appealed to the Fifth District Court of Appeals, where a three-judge panel remanded the case, *U.S. v. Dickinson*, to the district court for reconsideration of its decision, saying the ban was unconstitutional.[81] Judge West repealed his right-to-print prohibition, but he refused to reverse his contempt citations against the reporters.

The entire 15-member Fifth District Court of Appeals then considered the case and ruled against the reporters.[82] The court denied it was infringing on the right of a free press and said it was simply affirming the right of a federal district court to execute sentence against violators of its orders—regardless of the unconstitutionality of those orders.[83]

After *Dickinson*, there were other lower state and federal court decisions concerning gag orders, but the issue didn't reach the Supreme Court until 1976, in *Nebraska Press Association v. Stuart*.[84] Thus, for the first time, in 1976, the U.S. Supreme Court squarely faced the question of whether a trial court constitutionally could issue a gag order against the press on the grounds of assuring a fair trial. In this case the court reviewed, in the words of Chief Justice Warren Burger, problems "almost as old as the Republic."

The court's opinion notes the following facts of the case:

On the evening of Oct. 18, 1975, local police found six members of a family murdered in their home in a small Nebraska town of about 850 people. A suspect was arrested and arraigned the next morning in Lincoln County Court. The crime immediately attracted widespread news coverage by local, regional and national newspapers, radio and television stations.

Three days after the crime, the county attorney and defense counsel joined in asking the county court to enter a restrictive order relating to "matters that may or may not be publicly reported or disclosed to the public," because of the "mass coverage by news media" and the "reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial." Without taking evidence but after hearing argument from counsel, the county court granted the motion for a restrictive order that prohibited everyone in attendance from "releasing or authorizing the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced."

The defendant's preliminary hearing was held the same day that the order was issued and was open to the public but subject to the order. The defendant was bound over to the state district court for trial.

At that point, press and broadcast associations, publishers and individual reporters moved to intervene in the district court, asking that the restrictive order be vacated. The district judge granted the petitioners' motion to intervene and four days later, on Oct. 27, 1975, entered his own restrictive order. The judge found, "because of the nature of the crimes charged in the complaint, that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial."

The order applied only until the jury was impaneled and specifically prohibited petitioners from reporting five subjects: (1) the existence or contents of the confession the defendant had made to law enforcement officers which had been introduced in open court at arraignment; (2) the fact or nature of statements the defendant had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearings, and (5) the identity of the victims of the alleged sexual assault and the nature of the assault.

The order also prohibited reporting the exact nature of the gag order itself.

Four days later, the petitioners sought a stay in the district court and applied to the Nebraska Supreme Court for a writ of mandamus, a stay and an expedited appeal from the order. About one month later, the Nebraska Supreme Court heard oral arguments and one week later issued its opinion. The Nebraska court held on Dec. 2, 1975, that both society and the individual defendant had a vital interest in assuring that the defendant be tried by an impartial jury and found that because of the publicity surrounding the crime, this right was in jeopardy. The Nebraska Supreme

Court noted that its state statutes required that the defendant be tried within six months of his arrest and that a change of venue could move the trial only to adjacent counties, which had been subject to essentially the same publicity as the county where the crime was alleged to have occurred.

The Nebraska Supreme Court modified the district court order, prohibiting reporting of only three matters: (1) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (2) any confessions or admissions made to any third parties, except members of the press, and (3) other facts "strongly implicative" of the accused.

The U.S. Supreme Court granted a writ of *certiorari* Dec. 4 to address the important issues raised by the trial court order and modified by the Nebraska Supreme Court, but it denied a motion to expedite review or to stay entirely the order of the trial court pending the defendant's trial.

The court reviewed the many cases that had come before it concerning publicity of sensational cases, starting with the trial of Aaron Burr in 1807.

In the majority opinion, the chief justice stated:

> Taken together, these cases demonstrate that pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial. The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what attorneys, police and other officials do to precipitate news coverage."[85]

After a lengthy discussion of *Near v. Minnesota*,[86] and more recent cases concerning prior restraint, the court said:

> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted.[87]

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> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.[88]

The court decided that the damage can be particularly great when the

prior restraint falls on the communication of news and commentary on current events, stating:

> Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct.[89]

The court pointed out that most of the alternatives to prior restraint of publication in circumstances such as those present in this case were discussed by the court with obvious approval in *Sheppard v. Maxwell*[90] and found in this particular case, "There is no finding that alternative measures would not have protected [defendant's rights]. . ."[91]

The court said it was aware that the events took place in a community of 850 people and pointed out:

> It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.[92]

The chief justice, citing *Murphy v. Florida*,[93] commented that cases the court has decided "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process."[94]

Reversing the Nebraska Supreme Court's holding in this case, the court said in a unanimous opinion:

> We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome, to the extent that this order restrained publication of such material, it is clearly invalid.[95]

Justice White in a concurring opinion said.:

> I should add, however, that for the reasons which the court itself canvasses, there is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable.[96]

Role of Voluntary Press-Bar Guidelines

The Supreme Court in the *Nebraska Press Association* case approvingly noted efforts to develop voluntary guidelines for courts, lawyers, press and broadcasters.[97] In preliminary pre-*certiorari* filings of the case which became *Nebraska Press Association v. Stuart*, Justice Blackmun guided the Nebraska Supreme Court to its own state court determinations that voluntary press-bar guidelines mean "voluntary," and no such voluntary guidelines could be made mandatory by court authority.[98]

However, the Washington State Supreme Court in 1981, in a five-to-four decision in *Federated Publications Inc. v. Swedberg*, held that press access to pre-trial hearings may be conditioned upon reporters' agreements to abide by "voluntary" state press-bar guidelines. The decision involved a preliminary hearing in a murder case in Bellingham, Washington, that had a tie to the "Hillside Strangler" slayings in the Los Angeles area.[99] The justices characterized the lower court order as "a good faith attempt to accommodate the interest of both defendant and press. . . ."[100] They further opined that the effect of the signed paper was a moral commitment, not a legally enforceable order.[101]

The United States Supreme Court declined on a seven-to-two vote to hear the appeal of the Federated Publications on May 17, 1982.[102]

Aftermath of Nebraska Press Case

With the *Nebraska Press Association* case in 1976, it was hoped that restraining orders would cease when the press was reporting events that transpire in the courtroom. However, in less than a year, the Supreme Court was faced with the issue again. The case arose in Oklahoma when an order was entered by the district court that enjoined the news media from "publishing, broadcasting, or disseminating, in any manner, the name or picture of (a) minor child" in connection with a juvenile proceeding involving that child then pending in court.[103] Reporters had been present in the courtroom in an earlier hearing, and the boy's name and picture had been printed and broadcast in the area.

Citing *Nebraska Press Association v. Stuart* and *Cox Broadcasting Corp. v. Cohn*,[104] the U.S. Supreme Court's decision in the case noted that in the *Cox* decision, the court had held that a state could not impose sanctions on the accurate publication of the name of a rape victim "which was publicly revealed in connection with the prosecution of the crime."[105] In *Cox Broadcasting*, a reporter learned the identity of the victim from an examination of indictments made available by the clerk for inspection in the courtroom during a recess of court proceedings against the alleged rapists.

The court in *Cox* made clear that the press may not be prohibited from "truthfully publishing information released to the public in official court records."[106] The principle was reaffirmed in *Nebraska Press*.

The court said in the Oklahoma case that the name and picture of the juvenile were "publicly revealed in connection with the prosecution of the crime"[107] much as the name of the rape victim in *Cox Broadcasting* was placed in the public domain. Under these circumstances, the court held, the district court's order abridged the freedom of the press.[108]

Chapter IV

Closed Courtrooms, the Latest Battleground

Finally, after the admonition of the Supreme Court in the *Sheppard* case to take "strong measures to ensure that the balance is never weighed against the accused,"[1] judges began closing courtrooms to protect the accused person's right to an impartial jury. The first case to arrive at the Supreme Court concerned a closed pretrial suppression hearing in a murder case near Rochester, N.Y., in July 1976.[2] The press reported that three individuals were apprehended, that the victim's body was never found, that there were bullet holes in the boat, that a revolver had been found and that there was a confession. Two of the accused individuals sought to suppress statements made to police, saying they had been given involuntarily.

At the hearing on this motion Nov. 4, 1976, defense counsel asked Judge DePasquale to close the proceedings, according to the Supreme Court, because "the unabated buildup of adverse publicity had jeopardized the ability of the defendants to receive a fair trial."[3] The prosecutor did not object, nor did the Gannett reporter in the courtroom.

After this motion, the courtroom was immediately cleared, and the hearing commenced. The newspaper's lawyers advised the reporter to submit a written request to Judge DePasquale for a hearing on the motion. This was done the next day, a Friday afternoon, while the suppression hearing was still in progress. The newspaper's request was denied, and the hearing was concluded that Friday afternoon. Three days later, Gannett sought to vacate the ruling on suppression, even though the hearing had been concluded. The judge denied Gannett's request. Gannett appealed, and the Supreme Court acted on the case July 2, 1979.

The issue, according to Justice Potter Stewart, was whether members of the public have an enforceable right to a public trial that can be asserted independently of the parties in the litigation. Stewart, writing for five members of the court, said, "we hold that members of the public have no

constitutional right under the Sixth and Fourteenth amendments to attend criminal trials."[4]

However, the concurring opinions of Justices Powell and Rehnquist and Chief Justice Burger cloud the holding so significantly that it is difficult, if not impossible, to say whether *Gannett* has precedential value, even in cases involving only pretrial proceedings.

As to the First Amendment right to attend and report on criminal trials, Stewart said the trial judge's closure decision was based "on an assessment of the competing societal interests involved . . . rather than on any determination that First Amendment freedoms were not implicated." Because a transcript of the suppression hearing was made available, Stewart said, any First and Fourteenth Amendment right to attend the criminal trial was not violated.[5]

Justice Stewart started with the premise that the court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial. Then, citing *Sheppard*, he stated:

> To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial publicity.
>
> ☆☆☆
>
> Publicity concerning pretrial suppression hearings such as the one involved in the present case poses special risks of unfairness. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and to insure that this evidence does not become known to the jury.[6]

Stewart's concern was the Sixth Amendment need for an impartial jury and also that news coverage of a pretrial hearing "could influence a public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial."[7]

The dissent, written by Justice Blackmun, pointed out the other side of this issue:

> A motion to suppress typically involves, as in this case, allegations of misconduct by police and prosecution that raise constitutional issues. Allegations of this kind, although they may prove to be unfounded, are of importance to the public as well as the defendant. The searches and interrogations that such hearings evaluate do not take place in public. The hearings therefore usually

> present the only opportunity the public has to learn about police and prosecutorial conduct, and about allegations that those responsible to the public for the enforcement of laws themselves are breaking it.[8]

In fact, the dissent said, the suppression hearing often is the only judicial proceeding of substantial importance that takes place during a criminal prosecution. Mr. Blackmun cited statistics from the City of New York that 89.7 percent of all criminal cases were terminated by dismissals or by a plea of guilty. To summarize the majority holding, however, Justice Rehnquist said in a concurring opinion:

> The court today holds, without qualification, that "members of the public have no constitutional right under the Sixth and Fourteenth amendments to attend criminal trials."[9]

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> . . . it necessarily follows that if the parties agree on a closed proceeding, the trial court is not required by the Sixth Amendment to advance any reason whatsoever for declining to open a pretrial hearing or trial to the public.[10]

Although Justice Powell concurred in the opinion, he raised the issue of the "public's having accurate information concerning the operation of its criminal justice system." He said he would hold explicitly that Gannett's reporter "had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing."[11]

As to this case, Justice Powell said, "the procedure followed by the trial court fully comported with that required by the Constitution."[12] However, Justice Blackmun's dissent did offer some minimum standards that the accused should establish before a court could be closed:

> First, he should provide an adequate basis to support a finding that there is a substantial probability that irreparable damage to his fair trial right will result from conducting the proceeding in public.[13]

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> Second, the accused should show a substantial probability that alternatives to closure will not protect adequately his right to a fair trial.[14]

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> Third, the accused should demonstrate that there is a substantial probability that closure will be effective in protecting against the perceived harm.[15]

The court's sharply divided ruling in *Gannett* was confusing and left many questions unanswered.[16] First, and perhaps most important, was whether *Gannett* applied to actual trials as well as pretrial hearings. Justice Stewart's majority opinion used the words "pretrial" and "trial" almost interchangeably, which gave the impression that trials also could be closed.[17] At the beginning of his opinion, Justice Stewart clearly stated that the case concerned a pretrial hearing.[18] Nonetheless, he later declared that members of the public and the press have no Sixth or Fourteenth Amendment right of access to criminal trials.[19]

The confusion was only compounded when the Chief Justice and Justice Rehnquist disagreed, although both were in the majority, about the ruling's application to actual trials.

Another unclear issue was the burden of proof required to close a hearing. The defendants in *Gannett* were able to secure a closed proceeding because of "unabated buildup of adverse publicity."[20] The public's interest in open trials raised another question. Although the majority said the public's interest was protected by the litigants,[21] what happens when the prosecutor decides that the public's interest is best served by an open proceeding? Another question concerns the procedural safeguards considered before a closure is granted. In *Gannett*, the newspapers were given a hearing within 10 days after the closed suppression proceeding.[22] Must a judge always hold such a hearing to provide both sides an opportunity to argue for or against closure?

These and many more questions were raised by lawyers, judges and journalists after the *Gannett* ruling. Newspapers tried to explain the decision, and in an unprecedented breach of the Supreme Court's customary silence, several of the justices spoke out publicly to give their own interpretations of *Gannett*. Meanwhile, trial judges who were uncertain about how to apply the ruling in the lower courts played it safe by slamming shut their courtroom doors. Judges excluded the public and the press from all sorts of proceedings, ranging from pretrial hearings to post-trial proceedings. In the 12 months after *Gannett*, there were 270 efforts to close various portions of criminal proceedings.[23] The Reporters Committee for Freedom of the Press, which chronicled attempts in its "Secret Court Watch Summary," reported that 131 of the attempted closures were granted and upheld on appeal. Fourteen were reversed,[24] and 111 of the attempts either

were denied by trial court or withdrawn by counsel.

Most of the attempted closures (171 of them) were sought at the pretrial stage, as in *Gannett*. About half of those resulted in closure. There were 49 attempts to close portions of actual criminal trials, and 23 were successfully closed. Thirty-nine motions were made to close pre-indictment proceedings and 24 of them were closed. Five of 11 attempts made to close post-trial conviction proceedings were successful.

Trial judges were closing proceedings not only to protect potential jurors from news coverage of a sensational murder trial, as in *Gannett*, but for such reasons as embarrassment to witnesses, victims, family, lawyers or defendants.

There also were at least four cases in which judges issued direct prior restraints on the news media.[25] In one case, a New Hampshire judge closed a pretrial hearing in a murder case. The judge later changed his mind and allowed a Keene Daily Sentinel reporter back in the proceedings. But the judge said the newspaper's lawyer must sit next to the reporter and advise him as to what information he could print without causing prejudice. The judge warned the reporter that if any prejudicial news were printed, he would be disciplined.[26]

The *Sentinel* appealed the ruling to the New Hampshire Supreme Court, where the decision was found to be invalid and vacated. The state supreme court explained that, "although the order is not a direct gag . . . it nonetheless constitutes an implied 'gag' order."[27]

In South Dakota, a trial judge issued a double gag order prohibiting the local press from publishing details of a rape case. The judge also told the press representatives they could not publish any information about the non-publication order. Several weeks later, a U.S. district court voided the order, calling it a "direct violation of the First Amendment" and "an undue restriction on self expression and freedom of the press. . . ."[28]

Closed Trials—The Richmond Victory

As a result of the *Gannett* decision, and the confusion that followed, the Supreme Court of Virginia sanctioned the closing of an entire criminal trial. The case began in July 1976, when John Paul Stevenson was convicted in a Virginia trial court of the 1975 stabbing murder of a Hanover County motel manager. The state supreme court found that evidence was improperly admitted and reversed the conviction. Two mistrials followed.

At the start of the fourth trial, Stevenson's attorney moved to close the courtroom, and Hanover Circuit Court Judge Richard H. C. Taylor granted

the motion without a hearing. Two Richmond newspapers filed motions that were denied by the judge. During the second day of the secret trial, Stevenson was acquitted. The state supreme court found no reversible error and cited *Gannett v. DePasquale*.

In a sweeping decision handed down July 2, 1980, exactly one year after the *Gannett* decision, the U.S. Supreme Court ruled that the public and the press have a First Amendment right to attend criminal trials. The court said this right is not absolute, but unless the trial court can find an "overriding interest" to justify closure, all criminal trials must be public.[29] There were six separate concurring opinions. All the concurrences offered slightly differing approaches to the case, but all were based on First Amendment claims.

The opinion, written by Chief Justice Burger and joined by Justices White and Stevens, stated the issue succinctly: "The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution."[30] The chief justice distinguished the *Richmond* case from *Gannett* by noting with emphasis "that the precise issue presented here has not previously been before this court. . . . (T)he court was not required to decide whether a right of access to *trials* as distinguished from hearings on *pre*trial motions, was constitutionally guaranteed."[31]

After reviewing the "unbroken" and "uncontradicted" history of open judicial proceedings in England and the U.S., the chief justice stated:

> . . . a presumption of openness inheres to the very nature of a criminal trial under our system of justice. This conclusion is hardly novel; without a direct holding on the issue, the Court has voiced its recognition of it in a variety of contexts over the years.[32]

He then concluded:

> We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.[33]

The chief justice also recognized the role of the news media as representatives of the public when he explained:

> Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a

> sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard.[34]

Richmond dealt with a criminal case, but the chief justice mentioned that civil cases also have "been presumptively open." But, he said, the question of civil trial openness is not raised by the case.[35] He also said the trial judge did not consider alternatives to excluding the public and press from the trial. Although these alternatives may have presented problems, he said, they were not "beyond the realm of the manageable."[36]

In holding that "[a]bsent an overriding interest . . . the trial of a criminal case must be open to the public," the chief justice refused to define the specific circumstances that constitute an "overriding interest."[37] However, he noted that access to the court is not absolute, and that trial judges could impose "reasonable limitations" on access to criminal trials.

In a concurring opinion, Justice Stevens called *Richmond* "a watershed case." He declared:

> Until today, the court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."[38]

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> Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment."[39]

Justice William Brennan, with whom Justice Thurgood Marshall joined in concurring, noted the "structural role" in the First Amendment.[40] He said:

> The Court's approach in right-of-access cases simply reflects the special nature of the First Amendment's right to gather information. Customarily, First Amendment guarantees are interposed to protect communication between speaker and listener. When so employed against prior restraints, free speech protections are almost insurmountable. But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in

securing and fostering our republican system of self-government.[41]

In another concurrence, Justice Stewart extended his analysis further than his brethren. He said the First Amendment "clearly gives the press and the public a right of access to trials themselves, civil as well as criminal."[42] But Justice Stewart recognized the limitations of *Richmond:*

> [T]his does not mean that the First Amendment right of members of the public and representatives of the press to attend civil and criminal trials is absolute. Just as a legislature may impose reasonable time, place and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public. Moreover, every courtroom has a finite physical capacity, and there may be occasions when not all who wish to attend a trial may do so. And while there exist many alternative ways to satisfy the constitutional demands of a fair trial, those demands may also sometimes justify limitations upon the unrestricted presence of spectators in the courtroom.[43]

Justice Harry Blackmun, also concurring, said he welcomed the high court's return to "legal history in determining the fundamental public character of the criminal trial." In *Gannett,* he said, the court only "gave a modicum of lip service to legal history."[44] Moreover, he said:

> It is gratifying . . . to see the court wash away at least some of the graffiti that marred the prevailing opinions in *Gannett.* No less than 12 times in the primary opinion in that case, the court (albeit in what seems now to have become clear dicta) observed that its Sixth Amendment closure ruling applied to the trial itself. . . . The resulting confusion among commentators and journalists was not surprising. The court's ultimate rule in *Gannett,* with such clarification as it provided by the opinions in this case today apparently is now to the effect that there is no Sixth Amendment right on the part of the public—or the press—to an open hearing on a motion to suppress. I, of course, continue to believe that *Gannett* was in error, both in its interpretation of the Sixth Amendment generally, and in its application to the suppression hearing, for I remain convinced that the right to a public trial is to be found where the Constitution explicitly placed it—in the Sixth Amendment.[45]

Despite all these concurrences by the justices with the idea that the

criminal trial should be open to the public and the press, trial judges still look for ways to protect the accused. In Massachusetts a state statute provided for mandatory closures of the courtroom for specified sexual offenses involving a victim under the age of 18.

The question was whether the statute, which was used to exclude the public and reporters from the trial of a man accused of the rape of three teenagers, violates the First Amendment. In *Globe Newspapers v. Superior Court*, handed down June 23, 1982, the United States Supreme Court held the mandatory closure statute did violate the First Amendment right of access to criminal trial as was determined in the Richmond case.[46] The Court said in a decision written by Justice Brennan:

> Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.[47]

Even though the interest in safeguarding the physical and psychological well-being of a minor was a compelling one for Justice Brennan, he said it did "not justify a *mandatory*-closure rule."[48] He added that a trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity, and understanding of the nature of the crime, the desires of the victim, and the interests of parents and relatives.[49]

As to the victim's second asserted interest—the encouragement of minor victims of sex crimes to come forward and provide accurate testimony—the Court found the claim not only speculative, but also open to serious question as a matter of logic and common sense.[50] Although the statute barred the public and the press from the courtroom during the testimony of the minor sex victims, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony.[51]

Chief Justice Burger and Justice Rehnquist dissented. They expressed concern that "society has gone to great lengths to protect minors *charged* with crime" but here the Court would not allow a state to protect the "minor *victims* of sex crimes."[52] The chief justice cited various articles about the traumatic effect of court proceedings on minor rape victims.[53] He also noted that in more than half of the states, public testimony by the minor victim will include television coverage.[54]

Justice O'Connor, in a concurring opinion, said she interpreted *Richmond Newspapers* and the *Globe Newspaper Co.* cases to apply only to criminal trials.[55]

Summarizing the holdings from *Gannett v. DePasquale* in 1979 to *Globe Newspaper Co. v. Superior Court* in 1982, the Supreme Court said openness in criminal trials "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."[56] But there were still at least two questions left for the Court.

The first question: Is there a right of access to the selection of jurors in a criminal case? The second question: Does the access right of the public and the press apply only to criminal trials? The Press-Enterprise in Riverside, California, provided opportunities for the Supreme Court to answer both questions.

In Press-Enterprise I the trial judge had permitted only three days of a six-week voire dire to be open in a rape and murder trial.[57] The judge defended his action by saying a prospective juror should have a "right of privacy . . . and a right to a fair trial should prevail (over) the right of the people to know."[58]

After the defendant was convicted and sentenced to death, the Press-Enterprise applied for release of the transcripts of the voir dire. The judge denied this application, saying:

> The jurors were questioned in private relating to past experiences, and while most of the information is dull and boring, some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion.[59]

The Press-Enterprise sought a writ of mandate from the California Appeals Court to compel the trial court to release the transcript and vacate the order closing the voir dire proceedings. The petition was denied, and the California Supreme Court refused to review. The newspaper took the case to the U.S. Supreme Court.

Chief Justice Burger, in a unanimous opinion January 18, 1984, said the process of juror selection is important "not simply to the adversaries but to the criminal justice system."[60]

> . . . Since the development of trial by jury the process of selection of jurors has presumptively been public process with exceptions only for good cause shown.[61]

Reviewing the roots of open trials from before the Norman Conquest to

two murder trials after the Boston Massacre in 1770, he noted,

> "Public jury selection—was the common practice in America when the Constitution was adopted."[62]

Chief Justice Burger said the difficulty of allocating the "right" to openness between the accused and the public is that no right "ranks higher than the right of the accused to a fair trial." Then he said

> But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness.[63]

He noted criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility. This in turn generates a community urge to retaliate and a desire to have justice done. Openness, he said, often has what can be described as a "community therapeutic value."[64] When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for understandable reactions and emotions.

Proceedings held in secret, the Chief Justice said, would deny this outlet and frustrate the broad public interest. Public proceedings, he said, assure the victims and the community that offenders are being brought to account for their criminal conduct "by jurors fairly and openly selected."[65]

Chief Justice Burger stressed that closed proceedings, although not absolutely precluded, must be rare and only for cause shown to outweigh the value of openness. For him:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.[66]

The trial court, he said, has the duty to articulate the interest, along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[67]

The Chief Justice noted no support was offered by the trial court for its conclusion that Sixth Amendment and juror privacy interests were sufficient to warrant the prolonged closure. He said the trial court has closed the proceedings for "an incredible six weeks" without considering alternatives to protect the interersts of the prospective jurors.

> Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire.[68]

In declining to release the transcript of the voir dire, the trial judge, according to Chief Justice Burger, said most of the information in the transcript was "dull and boring." The Chief Justice said those parts of the transcript reasonably entitled to privacy could have been sealed without such a sweeping order and the judge could then have explained why the material is entitled to privacy.[69]

There are circumstances concerning deeply personal matters, the court said, when the jury selection process may allow closure because of a compelling interest of a prospective juror. An example cited by the court involved testimony of an alleged rape. The court noted a prospective juror might privately inform the judge that she, or a member of her family, had been raped. Such a privacy interest must be balanced, Mr. Burger said, against the historic values of openness in the process.[70]

Since the trial court had failed to articulate findings with the requisite specificity and also failed to consider alternatives to closure and to total suppression of the transcript, the Supreme Court remanded the proceedings to the California courts.[71]

Mr. Justice Marshall, concurring, emphasized:

> . . . the constitutional rights of the public and press to access to all aspects of criminal trials are not diminished in cases in which "deeply personal matters" are likely to be elicited in voir dire proceedings.[72]

While the Press-Enterprise was battling this closure in the courts, it launched another challenge for access. This one concerned a 41-day closure of a preliminary hearing in a murder case.[73] Again the Press-Enterprise asked a California trial court for a transcript of the proceedings. Again the magistrate refused, and sealed the record. Again the newspaper appealed to the California Supreme Court, to no avail. The California Supreme Court said the right of access to criminal proceedings recognized in Press-Enterprise I and Globe Newspapers was intended only to apply to actual criminal trials, not to preliminary hearings.[74]

Another important distinction for the California high court was that Press-Enterprise II implicated a criminal defendant's Sixth Amendment impartial jury right while the interests of witnesses and third parties were involved in Press-Enterprise I and Globe Newspapers.[75]

But in a 7 to 2 decision decided June 30, 1986, Chief Justice Burger

pointed out a defendant's right to a fair trial and the public right of access are not necessarily inconsistent:[76]

> Plainly, the defendant has a right to a fair trial but as we have repeatedly recognized, one of the important means of assuring a fair trial is that the process be open to neutral observers.[77]

The right to an open trial is a shared right of the accused and the public, he said. The common concern is the "assurance of fairness."[78]

Rejecting the California Supreme Court's conclusion that the First Amendment was not implicated because the proceeding was not a criminal trial, the Chief Justice wrote

> (T)he First Amendment question cannot be resolved solely on the label we give the event, i.e. "trial" or otherwise, particularly where the preliminary hearing functions much like a full scale trial.[79]

In cases dealing with the claim of a First Amendment right of access to criminal proceedings, the Chief Justice said, "Our decisions have emphasized two complimentary considerations": Experience as to "whether the place and process has historically been open to the press and the public," and logic.[80]

As to logic, the court "has traditionally considred whether public access plays a significant positive role in the functioning of the particular process in question." Acknowledging some kinds of government operations "would be totally frustrated if conducted openly," the Court said, "other proceedings plainly require public access."[81]

If the particular proceedings in question passes these tests of experience and logic, the Chief Justice said, "a qualified First Amendment right of public access attaches." But even when a right of access attaches, he warned, "it is not absolute":

> While open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity. In such cases, the trial court must determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access.[82]

The same considerations that led the Court to apply the First Amendment right of access to criminal trials and the selection of jurors,

"lead us to conclude that the right of access applies to preliminary hearings as conducted in California."[83]

First, "tradition of accessibility of preliminary hearings of the type conducted in California." (Experience)

Second, "California preliminary hearings are sufficiently like a trial to justify" public access.[84] (Logic)

The Court concluded "the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California."[85]

Thus, under Press-Enterprise II, preliminary hearings cannot be closed "unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest'." If the interest is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that

> (F)irst, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's free trial rights.[86]

Since the standard applied by the California Supreme Court was "a reasonable likelihood of substantial prejudice" the judgment of that court was reversed.[87]

Mr. Justice Stevens noted in dissent that the Court reversed—without comment or explanation or any attempt at reconciliation—the holding in *Gannett (v. De Pasquale)*[88] yet, he added, in Press-Enterprise II the "Court tacitly recognizes the importance of public access to government proceedings generally [by] abjuring strict reliance on history and emphasizing the broad value of openness."[89]

Openness and a pretrial suppression hearing also were issues for the Supreme Court in *Waller v. Georgia*, May 21, 1984.[90] This time criminal defendants, who had been charged with violating state gambling statues, did not want the seven-day hearing closed. The prosecutor had convinced the judge that disclosure of the wiretap evidence would impinge on the privacy interests of third parties. The wiretap evidence took up less than 2½ hours.[91]

The men were convicted and appealed to the Georgia Supreme Court

on grounds that their Sixth Amendment rights had been violated. The Georgia high court ruled the trial court had properly balanced the public hearing rights of the defendants against the privacy rights of others.[92]

The U.S. Supreme Court granted certiorari to decide "whether the defendants' Sixth Amendment right to a public trial applies to a suppression hearing." Justice Powell speaking for a unanimous court said, "We hold that it does, and that the trial court failed to give proper weight to Sixth Amendment concerns."[93]

The opinion said:

> The need for an open proceeding may be particularly strong with respect to suppression hearings. A challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor. The public in general also has a strong interest in exposing the substantial allegations of police misconduct to the salutary effects of public scrutiny.[94]

In sum, the court held that "under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in Press-Enterprise I and its predecessors."[95]

Chapter V

Television in the Court, the Newest Ingredient

The issue of the effect of television coverage began in the Supreme Court with *Rideau v. Louisiana* in 1963.[1] The case started a few hours after a combination bank robbery, kidnapping and killing in Louisiana. Wilbert Rideau was apprehended by the police and jailed. The next morning, a 20-minute film with sound track was made of an interview in the jail between Rideau and the sheriff. In the course of the interview with the sheriff, Rideau admitted his responsibility for the robbery, kidnapping and murder. The film was shown over a local television station once each day for three consecutive days and was seen by a total audience of about 106,000 people. The parish in which Rideau was tried had approximately 150,000 residents. Because of overlaps in the total viewing audience, there is no way of knowing how many of these 150,000 actually saw the film.

Rideau's motion for a change of venue, based primarily on the television interview, was denied, and he was convicted and sentenced to death on the charge of murder. Two members of the jury that convicted him were sheriff's deputies of the parish in which the trial was held, and three members of that jury had stated on *voir dire* that they had seen the televised interview. Before the selection of these five jurors, Rideau had used all of the peremptory challenges allowed him, and his request that they be challenged for cause was denied.

The Supreme Court held that the question of who initiated the interview, whether it was Rideau, the representative of the state or some third party, was not important because the result in any case would be a denial of due process in refusing to grant the request for a change of venue. The court stated:

> For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people

> who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty of murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.[2]

☆☆☆

> The case now before us does not involve physical brutality. The kangaroo court proceedings in this case involved a more subtle but no less real deprivation of due process of law. Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge. Yet in this case the people of Calcasieu Parish saw and heard, not once but three times, a "trial" of Rideau in a jail, presided over by a sheriff, where there was no lawyer to advise Rideau of his right to stand mute.[3]

Of great significance in this case is the fact that the court said it would not hesitate in holding that this was a denial of due process "without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury." This is significant because, before this time, much emphasis had been placed by the court on the *voir dire* because it was believed that only through the *voir dire* could a reviewing court establish a particular bias or prejudice on the part of individual jurors. Without any substantial *voir dire* record, such prejudice would have to be presumed, a step the court had heretofore been reluctant to take.

Justices Clark and Harlan dissented stating that:

> Unless the adverse publicity is shown by the record to have fatally infected the trial, there is simply no basis for the court's inference that the publicity, epitomized by the televised interview, called up some informal and illicit analogy to *res judicata*, making petitioner's trial a meaningless formality.[4]

The dissenting opinion went on to distinguish the situation in *Irvin vs. Dowd* and finally stated:

> As we recognized in *Irvin*, however, it is an impossible standard to require that tribunal to be a laboratory, completely sterilized and freed from any external factors. The determination of impartiality, in

> which demeanor plays such an important part, is particularly within the province of the trial judge. And when the jurors testify that they can discount the influence of external factors and meet the standard imposed by the Fourteenth Amendment, that assurance is not lightly to be discarded. When the circumstances are unusually compelling, as in *Irvin*, the assurances may be discarded, but "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside."[5]

Television Coverage of Estes Trial

In 1965, in *Estes v. Texas*,[6] the court reversed a conviction involving the televising and filming of a trial. It should be understood at the outset that the court granted *certiorari* only as to the questions emanating from allowing the trial to be televised. The court specifically denied *certiorari* as to the question of pretrial news coverage; therefore, a great deal of the opinions expressed by the various justices are not pertinent to the subject here under study. Nevertheless, the ultimate question was whether the due process clause of the Fourteenth Amendment had been violated in this case by allowing the court proceedings to be televised.

The Supreme Court reversed the lower court conviction by a five-to-four margin with five of the nine judges rendering separate opinions and with one justice, in essence, rendering two opinions. In *Rideau*, the court considered a set of circumstances it believed so inherently prejudicial as to preclude the possibility of a fair trial, and it was not required that the circumstances of possible prejudice be tied to an actual fact of prejudice or particular jurors. On this point, the court in *Estes* stated:

> In *Rideau v. Louisiana*, this court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the due process clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial.[7]

The court then went on to make it clear that *Estes* was another case in which the showing of actual prejudice was not a prerequisite to reversal:

> The State, however, says that the use of television in the instant case was "without injustice to the person immediately concerned," basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to

> invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case."[8]

The court mentioned *Rideau v. Louisiana*[9] and *Turner v. Louisiana*[10] and stated:

> In each of these cases the court departed from the approach it charted in *Stroble v. California*, and in *Irvin v. Dowd*, where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner*, the court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it.[11]

Justice Brennan, one of the four dissenting judges, noted in a "postscript" opinion that only four of the five justices voting for reversal considered televising criminal trials as "constitutionally infirm" under any circumstances and that the fifth judge voting for reversal, Justice Harlan, confined his objections to television in the courtroom in the subject case, which was a "heavily publicized and highly sensational affair."

Justice Stewart's dissenting opinion expressed concern over the effect the majority opinion might have on future cases involving the First Amendment. ". . . I would be wary of imposing any *per se* rule which, in the light of future technology might serve to stifle or abridge true First Amendment rights."[12] With regard to the scope of the court's review, Justice Stewart stated that three of the four separate constitutional claims were declined for review by the court. As previously mentioned, one of those the court refused to review was the claim that members of the jury "had received through the news media damaging and prejudicial evidence. . . "[13] The dissent then stated:

> Because of our refusal to review the petitioner's claim that pretrial publicity had a prejudicial effect upon the jurors in this case, and because, insofar as the September hearings were an element of that publicity, the claim is patently without merit, that issue is simply not here. Our decision in *Rideau v. Louisiana*, therefore, has no bearing at all in this case.[14]

Stewart concluded:

> The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of

justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms.[15]

States Allowed to Experiment With TV in Courtrooms

Despite the ruling in *Estes*, some states began experimenting with television coverage of trials. The state of Colorado had allowed cameras, both still and television, into the courts as early as 1956.[16] The Colorado Supreme Court modified its rule subsequent to *Estes* to require the permission of participants in the trial to be photographed and their testimony broadcast in an effort to overcome the Supreme Court's ruling in *Estes*.

An experiment began in the Florida courts in July 1977 and continued through June 1978.[17] One of the first trials to be covered under the one-year pilot program, during which electronic media were permitted to cover all judicial proceedings without the consent of participants, was that of two Miami Beach policemen who were charged with conspiracy to commit burglary, grand larceny and possession of burglary tools. The counts covered breaking and entering a well-known Miami Beach restaurant. The state's principal witness was John Sion, an amateur radio operator who, by sheer chance, had overheard and recorded conversations between the pair over their police two-way radios during the burglary. As the Supreme Court said, "Not surprisingly, these novel factors attracted the attention of the media."[18]

By pretrial motion, counsel for the pair sought to have the experimental Canon 3A (7) declared unconstitutional on its face and as applied to them. The trial court denied relief, but certified the issue to the Florida Supreme Court. However, the Florida court declined to rule on this question, on the ground that it was not directly relevant to the criminal charges against the policemen.[19]

Television cameras were present during portions of the trial. However, only two minutes and 55 seconds of the trial were broadcast. The jury returned a guilty verdict on all counts. The policemen moved for a new trial, saying that, because of the television coverage, they had been denied a fair and impartial trial. No evidence of specific prejudice was offered.

The Florida District Court of Appeals affirmed the convictions and declined to discuss the validity of Canon 3A (7) because the Florida Supreme Court had set up the experiment during that year. The Florida

Supreme Court then denied review, holding that the appeal, which was limited to a challenge of Canon 3A (7), was moot by reason of its decision in *Post Newsweek Stations* rendered shortly after the decision of the District Court of Appeals.[20]

The decision was taken to the U.S. Supreme Court, and on Jan. 26, 1981, the justices affirmed the convictions of the former policemen. The court said the "six separate opinions in *Estes* must be examined carefully to evaluate the claim that it represents a *per se* constitutional rule forbidding all electronic coverage."[21] Because Justice Harlan had provided the fifth vote necessary to support the judgment in *Estes*, the court said, "Justice Harlan's opinion is therefore fundamental to an understanding of the ultimate holding of *Estes*."[22] Chief Justice Burger, writing for the majority in *Chandler*, said:

> Justice Harlan's opinion, upon which analysis of the constitutional holding of *Estes* turns, must be read as defining the scope of that holding. we conclude that *Estes* is not to be read as announcing a constitutional rule barring still photographic, radio and television coverage in all cases and under all circumstances. It does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communications, was in its relative infancy in 1964, and is, even now, in a state of continuing change.[23]

As to whether the court in 1981 should promulgate a constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial of due process, the chief justice said:

> An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage. A case attracts a high level of public attention because of its intrinsic interest to the public and the manner of reporting the event. The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly.[24]

As to the *Chandler* case itself, the chief justice said:

> Here, the record does not indicate that appellants (policemen) requested an evidentiary hearing to show adverse impact or injury. Nor does the record reveal anything more than generalized allegations of prejudice.[25]

The question of the status of the *Estes* decision troubled at least two of the justices in writing concurring opinions in *Chandler*. Justice Stewart said, "Although concurring in the judgment, I cannot join the opinion of the court because I do not think the convictions in this case can be affirmed without overruling *Estes v. Texas*, 381 U.S. 532."[26]

Justice White, concurring in the judgment, stated:

> For the reasons stated by Justice Stewart in his concurrence today, I think *Estes* is fairly read as establishing a *per se* constitutional rule against televising any criminal trial if the defendant objects. So understood, *Estes* must be overruled to affirm the judgment below.[27]

> Although the Court's opinion today contends that it is consistent with *Estes*, I believe that it effectively eviscerates *Estes*.[28]

Footnotes

Introduction

*Simon, Rita J., Does The Court's Decision in *Nebraska Press Association* fit the Research Evidence on the Impact on Jurors of News Coverage?, 29 Stan. L. Rev. 515, 528 (1977).

Chapter I

[1]Chafee, *Free Speech in the United States*.
[2]B.C. 63-A.D. 14.
[3]Patterson, Free Speech and a Free Press, at 27-28.
[4]*Ibid.*
[5]*Id.* at 31.
[6]Trial of John Udall, 1 *Howell's State Trials*, 1271 (1613).
[7]Supra note 3, at 32.
[8]*Id.* at 34.
[9]14 Chas. II, c. 33.
[10]Supra note 3, at 41.
[11]*Id.* at 50.
[12]4 *Blackstone's Commentaries*, 151.
[13]20 *Howell's State Trials*, 860, 895 (1770).
[14]10 Anne, c. 19, paras. 101, 118.
[15]Supra note 3, at 57.
[16]Repeal of advertisement tax, 1853; repeal of stamp tax, 1855; repeal of paper tax, 1861; repeal of "security for good behavior" act, 1869.
[17]Adopted July 23, 1868.
[18]Hansard, "Parliamentary Debates," 18 Victoria, Vol. 137, p. 1123.
[19]*Id.* at 1124.
[20]17 *Howell's State Trials*, 675 (1735).
[21]Supra note 1, at 21.
[22]1 *Journal of Continental Congress*, 57 (1800 Edition).

[23]Rutland. *The Birth of The Bill of Rights*. 1776-1794. 78

[24]*Ibid*

[25]Virginia Declaration of Rights. Adopted June 12. 1776

[26]U S. Constitution. Articles I-VII. The Articles of Confederation were also silent on the subject of the press. Rutland. *The Birth of The Bill of Rights*. 1776-1794. 78

[27]5 *Elliot's Debates*, 445

[28]3 *Elliot's Debates*, 449

[29]4 *Elliot's Debates*, 314

[30]Supra note 1. at 143. also see Rogge. *Congress Shall Make No Law* . 56 Mich L. Rev. 331. 338-340 (1958)

[31]3 *Elliot's Debates*, 445-9 (2d Ed. 1836). Patterson. *Free Speech and Free Press*. 116-7

[32]Supra note 3. ch. 4

[33]Supra note 23. at 148. 154. 157. 161-2. 171-4. 181

[34]Supra note 1. at 13

[35]10 *Writings of Benjamin Franklin*. 378 (Smyth Ed. 1907) [Emphasis in original]

[36]*Republica v. Oswald*, Penn. Reports. 1 Dallas 319 (1788)

[37]Schofield. *Essays on Constitutional Law and Equity*. 521 522

[38]1 *Annals of Congress* 451

[39]5 *Writings of James Madison*. 4067 (Hunt Ed.)

[40]1 *Annals of Congress*. 451

[41]*Id.* at 452

[42]*Ibid*

[43]*Id.* at 468

[44]*Id.* at 699

[45]*Id.* at 783

[46]*Id.* at 784

[47]Supra note 23. at 208

[48]Carroll. *Freedom of Speech and of the Press in the Federalist Period*. The Sedition Act. 18 Mich. L. Rev. 615. 635 (1920)

[49]Chafee. *Free Speech in The United States*. 19

[50]IV Blackstone. *Commentaries*. 151

[51]Dean of St. Asaph's Case. 4 Doug. 73. 172 (1784)

[52]Supra note 49. at 11

[53]*Id.* at 18

[54]Cohn. *The Firstness of the First Amendment*. 56 Yale L. J. 472 (1956)

[55]*Id.* at 473

[56]*Id.* at 475

[57]Supra note 46

[58]1 *Journal of the Senate*. 70 (Sept. 3. 1789)

[59]*Id.* at 77 (Sept. 9, 1789)
[60]2 *Annals of Congress* 1984-1985
[61]Recorded in Chenery, W. L., *Freedom of the Press*, 29 (1955)
[62]Recorded in 56 *Michigan L. Rev.* 331, 347 (1958)

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[1]Fox, Sir John, *The History of Contempt of Court*, 1927
[2]Unreported officially but see Wilmont, *Notes of Opinions and Judgments*, 243 (1802)
[3]51 and 52 Vict. c. 64 Sec. 3
[4](1945) K.B. 485
[5]44 T.L.R. 303, 300 K.B. (1928)
[6]4 Stat. 487 (1831) (substantially embodied in 18 U.S.C. Sec. 401, 1958)
[7]247 U.S. 402 (1918)
[8]313 U.S. 33 (1941)
[9] *Id.* at 48
[10]314 U.S. 252 (1941)
[11]249 U.S. 47 (1919)
[12]*Id.* at 52
[13]*Id.* at 267
[14]*Id.* at 268
[15]*Ibid.*
[16]*Id.* at 271
[17]328 U.S. 331 (1946)
[18]*Id.* at 346
[19]*Id.* at 348
[20]*Id.* at 349
[21]331 U.S. 307 (1947)
[22]*Id.* at 373
[23]*Id.* at 374
[24]*Id.* at 376
[25]*Id.* at 391
[26]67 A.2d 497 (1949) cert. den. 338 U.S. 912 (1950)

Chapter III

[1]Will, *Free Press v. Fair Trial*, 12 DePaul L. Rev. 197, 199, N. 7
[2]In re Oliver, 333 U.S. 257 (1948); In re Murchison, 349 U.S. 133 (1955)
[3]Ex Parte Milligan, 4 Wall. (71 U.S.) 2, 18 L. ed. 281 (1866)
[4]205 U.S. 454, at 462 (1907)
[5]12 How. (53 U.S. 361)
[6]*Id.* at 366
[7]98 U.S. 145, 25 L. ed. 244 (1878)
[8]*Id.* at 155
[9]*Id.* at 157
[10]120 U.S. 430, 30 L. ed. 708, 7 S.Ct. 614 (1886)
[11]*Act of the Territory of Utah*, Laws 1884, p. 124
[12]Supra note 10, at 434
[13]123 U.S. 131, 31 L. ed. 80, 8 S.Ct. 21 (1887)
[14]*Id.* at 167
[15]Supra note 10
[16]142 U.S. 148, 35 L. ed. 968, 12 S.Ct. 171 (1891)
[17]*Id.* at 154
[18]146 U.S. 140, 66 L. ed. 917, 13 S.Ct. 50 (1892)
[19]159 U.S. 510, 40 L. ed. 237, 16 S.Ct. 62 (1895)
[20]Supra note 11
[21]218 U.S. 245, 54 L. ed. 1021, 31 S.Ct. 2 (1910)
[22]*Id.* at 248
[23]*Id.* at 251
[24]*Stroud v. U.S.*, 251 U.S. 15, 64 L. ed. 103, 40 S.Ct. 50 (1919)
[25]261 U.S. 87, 67 L. ed. 543, 43 S.Ct. 265 (1923)
[26]*Ibid.*
[27]319 U.S. 427, 87 L. ed. 1492, 63 S.Ct. 1129 (1943)
[28]341 U.S. 50, 95 L. ed. 740, 71 S.Ct. 549 (1951)
[29]*Ibid.*
[30]*Id.* at 51
[31]*Craig v. Harney*, 331 U.S. 367, 91 L. ed. 1546, 67 S.Ct. 1249; *Pennekamp v. Florida*, 328, U.S. 331, 90 L. ed. 1295, 66 S.Ct. 1029; *Bridges v. California*, 314 U.S. 252, 86 L. ed. 192, 62 S.Ct. 190
[32]Supra note 29, at 52
[33]343 U.S. 181, 96 L. ed. 872, 72 S.Ct. 599 (1952)
[34]*Id.* at 193
[35]*Ibid.*
[36]*Id.* at 195

[37] *Id* at 201
[38] *Ibid*
[39] Supra note 33
[40] Supra notes 28 and 30
[41] 343 U S 946, 96 L ed 1350, 72 S Ct 860 (1952)
[42] *Id* at 947
[43] *Id* at 948
[44] 351 U S 454, 100 L ed 1331, 76 S Ct 965 (1956)
[45] *Id* at 462
[46] *Id* at 462
[47] *Id* at 463
[48] 360 U S 310, 3 L ed 2d 1250, 79 S Ct 1171 (1959)
[49] *Id* at 312
[50] *Id* at 313
[51] 366 U S 716, 6 L ed 2d 846, 81 S Ct 1662 (1961)
[52] 366 U S 717, 6 L ed 2nd 751, 81 S Ct 1639 (1961)
[53] *Id* at 722
[54] Supra notes 7, 8, 9
[55] Supra note 52, at 728
[56] *Ibid*
[57] *Id* at 729
[58] 369 U S 541, 8 L ed 2d 98, 82 S Ct 955 (1962)
[59] Supra note 52
[60] Supra note 58, at 557
[61] Supra note 52
[62] Supra note 44
[63] *Sheppard v Maxwell*, 384 U S 333, 16 L ed 2d 600, 86 S Ct 1507 (1966)
[64] *Id* at 362
[65] Id at 339 ff
[66] *Id* at 350
[67] *Id* at 362-363
[68] 421 U S 794, 44 L ed 2d 589, 95 S Ct 2031 (1975)
[69] 360 U S 310, 3 L ed 2d 1250, 79 S Ct 1171 (1959)
[70] Supra note 68 at 795
[71] Supra note 69
[72] Supra note 68 at 802-803
[73] 522 F 2d 242 (7th Cir 1975)
[74] Supra note 58
[75] Supra note 63
[76] Supra notes 7, 8, 9

[77]Supra note 63
[78]*Id.* at 362
[79]*Ibid.*
[80]*United States v. Dickinson*, 465 F. 2d 496 (1972)
[81]*Id.* at 497
[82]476 F. 2d 373 (1973)
[83]Certiorari denied, 414 U.S. 979 (1973)
[84]427 U.S. 539, 49 L. ed. 2d 683, 96 S. Ct. 2991 (1976)
[85]*Id.* at 554-555
[86]283 U.S. 697, 75 L. ed. 1357, 51 S. Ct. 625 (1931)
[87]Supra note 84 at 559
[88]*Ibid.*
[89]*Ibid.*
[90]Supra note 63
[91]Supra note 84 at 565
[92]*Id.* at 567
[93]Supra note 68
[94]Supra note 84 at 565
[95]*Id.* at 570
[96]*Ibid.*
[97]Supra note 84, fn. 1, also the concurrence of Justice Brennan expressly approving the voluntary guideline approach. *Id.* at 613, with Nebraska guidelines cited 613 to 617.
[98]*Nebraska Press Association v. Stuart* (proceedings before Justice Blackmun), 423 U.S. 1327 at 1330-31. Also see *State v. Simants*, 194 Neb. 783 at 801-02, 236 N.W. 2d 794, at 805 (1975). Subsequently, the Nebraska news media have successfully worked with Nebraska's Supreme Court and Judicial Council on court-press guidelines which have avoided a rash of closures of Nebraska courts previously experienced there in pretrial hearings. cf. Guidelines on Closure of Judicial Proceedings, 6 Med. L. Rptr. 2306, Nebraska Supreme Court. Nebraska media repetitively cite voluntary press-bar guidelines against closure motions in preliminary hearings as an available alternative to closure.
[99]*Federated Publications, Inc. v. Swedberg*, 7 Med. L. Rptr. 1865, Washington Supreme Court.
[100]*Id.* at 1868
[101]*Ibid.*
[102]72 L. ed. 2d 862 (1982)
[103]*Oklahoma Publishing Company v. District Court*, 430 U.S. 308. Also see *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) and *Landmark Communications Inc. v. Virginia*, 534 U.S. 829 (1978).

[104]420 U S 469, 43 L ed 2d 328, 95 S Ct 1029 (1978)
[105]Supra note 102 at 310
[106]Supra note 103 at 496
[107]Supra note 102 at 311-312
[108]*Id* at 312

Chapter IV

[1]*Sheppard v Maxwell*, 384 U S 333 (1966) See note 63 Chapter III
[2]*Gannett v DePasquale*, 442 U S 368 (1979)
[3]*Id* at 375 Actually the defense attorney asked for closure because they were about to " take evidentiary matters in consideration here that may or may not be brought forth subsequently at trial " (Exclusionary Order, 1976, *People v Jones and Greathouse*, County Court, Seneca County, Indictment Nos 76-18 and 79-19)
[4]*Id* at 391
[5]*Id* at 393
[6]*Id* at 378
[7]*Ibid*
[8]*Id* at 435
[9]*Id* at 403
[10]*Id* at 404
[11]*Id* at 397
[12]*Id* at 403
[13]*Id* at 441
[14]*Ibid*
[15]*Id* at 442
[16]See Richard M Schmidt, "The Gannett Decision A Contradiction Wrapped in an Obfuscation Inside an Enigma," The Judge's Journal, Fall 1979, p 13, Paul Britton, "The Right to Attend Pretrial Criminal Proceedings Free Press, Public Trial, And Priorities In Curbing Pretrial Publicity," 28 Syracuse Law Review 875 (1977), *Timothy v Coffey*, "Criminal Procedure—Public Trial—The Public Has No Constitutional Right to Attend Pretrial Suppression Hearings," 11 *Texas Tech Law Review* 159 (1979), Lyle Denniston, "October Comes Soon," *The Quill*, September 1979, pp 29-34, Richard F Good, "A Right of Access to a Criminal Courtroom Gannett Co v DePasquale," 51 *University of Colorado Law Review*, 425 (1980), Arthur John Keeffe, "The Boner Called Gannett," 66 *ABA Journal*, February 1980, pp 227-228, Stephen Stewart Madsen, "The Right to Attend Criminal Hearings," 78 *Columbia Law Review* 1308 (1978), Note, "Closure of Pretrial Proceedings," 93 Harvard Law Review 62 (1979),

Bruce W. Sanford. "No Quarter From This Court." *Columbia Journalism Review*, September-October 1979, pp. 59-63. Dennis Watson. "Exclusion of the Press and Public From Pretrial Criminal Proceedings to Guarantee Fair Trial." 25 *Wayne Law Review*, 883 (1979)

[17] *Id.* at 369

[18] *Id.* at 370

[19] *Id.* at 391

[20] *Id.* at 375

[21] *Id.* at 384

[22] *Id.* at 375

[23] News Media & The Law, August-September 1979, pp. 10-23

[24] *Ibid*

[25] News Media & The Law, November-December 1979, pp. 7-9

[26] *Keene Publishing v. Cheshire County Superior Court*, 5 Med. L. Rptr. 1626 (1979). *Time*, Sept. 17, 1979, p. 82

[27] *Id.* at 1627

[28] *Huron Publishing v. Martin*, 5 Med. L. Rptr. 1871 (1979)

[29] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. ed. 2d 973, 100 S. Ct. 2814

[30] *Id.* at 558

[31] *Id.* at 563-564

[32] *Id.* at 573

[33] *Id.* at 580

[34] *Id.* at 572-573

[35] *Id.* at 580 at footnote 17

[36] *Id.* at 581

[37] *Ibid*

[38] *Id.* at 582

[39] *Id.* at 583

[40] *Id.* at 580

[41] *Id.* at 587

[42] *Id.* at 599

[43] *Id.* at 600

[44] *Id.* at 601

[45] *Id.* at 601-602

[46] *Globe Newspaper Company v. Superior Court*, ___ U.S. ___, 73 L. ed. 2d 248, 102 S. Ct. 2613 (1982)

[47] 73 L. ed. 2d at 257, 102 S. Ct. at 2620

[48] 73 L. ed. 2d at 258, 102 S. Ct. at 2621 (Emphasis in original.)

[49] *Ibid*

[50]73 L ed 2d at 259, 102 S Ct at 2622
[51]*Ibid*
[52]73 L ed 2d at 260, 102 S Ct at 2622 (Emphasis in original.)
[53]73 L ed 2d at 264, 102 S Ct at 2626
[54]73 L ed 2d at 263, 102 S Ct at 2625
[55]73 L ed 2d at 260, 102 S Ct at 2623. But also see *Newman v. Graddick*, 9 Med L Rptr 1104 U S Court of Appeals Eleventh Circuit, Jan 5, 1983 for appeals court view of application of *Richmond* and *Globe* cases to civil actions
[56]*Press Enterprise Co. v. Superior Court*, 464 U S 501 (1984)
[57]Id at 503
[58]Id at 504
[59]Ibid
[60]Id at 505
[61]Ibid
[62]Id at 508
[63]Ibid
[64]Ibid
[65]Id at 509
[66]Id at 510
[67]Ibid
[68]Id at 511
[69]Id at 513
[70]Id at 512
[71]Id at 513
[72]Id at 520
[73]*Press Enterprise Co. v. Superior Court*, 106 S Ct 2735 (1986)
[74]37 Cal 3d 772, at 776
[75]106 S Ct 2739
[76]Id at 2740
[77]Ibid
[78]Ibid
[79]Ibid
[80]Ibid
[81]Id at 2741
[82]Ibid
[83]Ibid
[84]Id at 2742
[85]Id at 2743
[86]Ibid
[87]Id at 2743-44
[88]Id at 2752
[89]Id at 2751

[9]104 S. Ct. 2210 (1984)
[10]Id. at 2213
[11]251 Ga. 124 (1983)
[12]104 S. Ct. at 2214
[13]Id. at 2216
[14]Ibid.

Chapter V

[1]*Rideau v. Louisiana*, 373 U.S. 723, 10 L. ed. 2d 663, 83 S.Ct. 1417 (1963)
[2]Supra note 1 at 726
[3]*Ibid.*
[4]Supra note 1 at 729
[5]*Id.* at 733
[6]381 U.S. 532, 14 L. ed. 2d 543, 85 S.Ct. 1628 (1965)
[7]*Id.* at 538
[8]*Id.* at 542
[9]Supra note 1
[10]379 U.S. 466, 13 L. ed. 2d 424, 85 S.Ct. 546 (1965)
[11]Supra note 6 at 543
[12]*Id.* at 604
[13]Petition for Writ of Certiorari, question 3, p. 3
[14]Supra note 6 at 610
[15]*Id. at 614*
[16]*132 Colo. 591*
[17]*Petition of the Post-Newsweek Stations, Florida, Inc.*, 347 So. 2d 402 (Fla. 1976). In 1978, based on its own study of the possibility of permitting courtroom coverage by electronic media, the Conference of State Chief Justices, by a vote of 44 to 1, approved a resolution to allow the highest court of each state to promulgate standards and guidelines regulating radio, television and other photographic coverage of court proceedings. (Resolution I. Television, Radio, Photographic Coverage of Judicial Proceedings, adopted at the Thirtieth Annual meeting of the Conference of Chief Justices, Burlington, Vt., Aug. 2, 1978)
[18]*Chandler v. Florida*, 449 U.S. 560, 66 L. ed. 2d 740, 101 S.Ct. 802 (1981)
[19]*State v. Granger*, 352 So. 2d 175 (Fla. 1978)
[20]Supra note 17
[21]Supra note 18 at 570
[22]*Id.* at 571

[23] *Id.* at 573-74
[24] *Id.* at 574-75
[25] *Id.* at 577
[26] *Id.* at 583
[27] *Id.* at 587
[28] *Id.* at 588

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